January 12, 2006

The Honorable Rob McKenna
Attorney General
State of Washington
1125 Washington Street SE

Dear Attorney General McKenna:

On behalf of the Washington State Association of Municipal Attorneys, please accept the enclosed comments for consideration in your adoption of the Model Rules for Public Records Disclosure. We fully support a legal and consistent response to requests for public records.

Beyond any concern with a particular section of the draft is the overall organization of it. I am unaware of any prior sections of the comments to the Washington Administrative Code (WAC) so closely resembling the WAC provisions themselves. The result is a document over fifty pages long to state less than ten pages of actual rules. While the intention is to facilitate the public disclosure of documents, the likely result will be the opposite as local governments and citizens around the state struggle to understand what is actually a very straightforward law.

My hope is that you will more clearly distinguish the comments from the rules so that anyone can see what is truly expected from an agency when a public document is requested.

To facilitate my own review, I segregated the rules from the comments. I then incorporated feedback to each of the rules and comments, using color coding to try to be as clear as possible. My feedback to you includes not only my own concerns, but those of the WSAMA membership as well.

As you will see, there is not so much reaction to the rules as the comments. Perhaps the comments could be issued separately as an opinion (which is what they are). I believe that this process would have significantly more meaning to the impacted agencies and citizens if it were not so confounded by the opinions put forth in the comments. The current draft discourages serious consideration and comment by virtue of its volume.

On behalf of WSAMA, your consideration of our concerns is greatly appreciated. I know that we share the same interests in customer service and open government.

I remain available to discuss this matter at your convenience (253) 983-7704.

Sincerely,

Heidi Ann Wachter

Heidi Wachter
WSAMA Board Member

HW:ddr

Chapter 44-14 WAC
PUBLIC RECORDS ACT--MODEL RULES
INTRODUCTORY COMMENTS

AUTHORITY AND PURPOSE
NEW SECTION
[redacted]. ~~(1) RCW 42.17.260(1) requires each agency to make available for inspection and copying nonexempt "public records" in accordance with published rules. The act defines "public records" to include any "writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained "by the agency." These include electronic records. RCW 42.17.260(2) requires each agency to set forth "for informational purposes" every law, in addition to the Public Records Act, that exempts or prohibits the disclosure of public records.~~
~~(2) The purpose of these rules is to implement the act. These rules provide information to persons wishing to request access to public records of the (agency) and establish expectations both of~~
~~11/22/05 1:55 PM [5] OTS-8492.2~~
~~requestors and of (agency) staff who are to assist members of the public in obtaining such access.~~
~~(3) The purpose of the act is to provide the public full access to information concerning the conduct of government, mindful of individuals' privacy rights and the desirability of the efficient administration of government. The act and these rules will be interpreted in favor of disclosure. In carrying out its responsibilities under the act, the (agency) will be guided by the provisions of the act describing its purposes and interpretation.~~
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The purpose of these rules is to comply with the Legislative directive to write advisory model rules intended to implement the Public Disclosure Act. RCW 42.17.348(2)

AGENCY DESCRIPTION--CONTACT INFORMATION--PUBLIC RECORDS OFFICER
11/22/05 1:55 PM [8] OTS-8492.2
NEW SECTION
[redacted] (1) The agency (describe services provided by agency). The agency's central office is located at (describe). The agency has field offices at (describe, if applicable).
(2) Any person wishing to request access to public records of (agency), or seeking assistance in making such a request should contact the public records officer of the (agency):

Public Records Officer
(Agency)
(Address)
(Telephone number)
(fax number)
(e-mail)
Information is also available at the (agency's) web site at www.(.*.*.*.*.*.*).
(2) The public records officer will oversee compliance with the act but another agency staff member can process the request. The public records officer and the agency will provide the "fullest assistance" to requestors in making requests for identifiable records under the act, to create and maintain for use by the public and (agency) officials an index to public records of the (agency, if applicable), to ensure that public records are protected from damage or disorganization, and to prevent fulfilling public records requests from causing excessive interference with essential functions of the (agency).
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AVAILABILITY OF PUBLIC RECORDS
NEW SECTION
[redacted]. (1) **Hours for inspection of records.** Public records are available for inspection and copying during normal business hours of the (agency), (provide hours, e.g., Monday through Friday, 8:00 a.m. to 5:00 p.m., excluding legal holidays). Records must be inspected at the offices of the (agency).
(2) **Records index.** (*If agency keeps an index.*) There is available for use by members of the public an index of public records, including (describe contents). It may be accessed on-line at (web site address). (If there are multiple indices, describe each and its availability.)
(*If agency is local agency opting out of the index requirement.*) The agency finds that maintaining an index is unduly burdensome and would interfere with agency operations. The requirement would unduly burden or interfere with agency operations in the following ways (specify reasons).
(3) **Organization of records.** The agency shall maintain its records in a reasonably organized manner. The agency shall take reasonable actions to protect records from damage and disorganization. A requestor shall not take agency records from agency offices without the permission of the public records officer. A variety of records is available on the (agency) web site at (web site address). Requestors are encouraged to view the documents available on the web site prior to submitting a records request.
(4) **Making a request for public records.**
(a) Any person wishing to inspect or copy public records of the (agency) should make the request in writing on the agency's request form, or by letter, fax, or electronic mail addressed to

the public records officer and including the following information:
! Name of requestor;
! Address of requestor;
! Other contact information, including telephone number and any e-mail address;
! Identification of the public records adequate for the public records officer to locate the records; and
! The date and time of day of the request.
(b) If the requestor wishes to have copies of the records sent instead of simply being made available for copying, he or she should so indicate and indicate a willingness to pay for the records. Pursuant to section (insert section), standard photocopies will be provided at (amount) cents per page.
(c) A form is available for use by requestors at the office of the public records officer and on-line at (web site address).
(d) The public records officer may accept requests for public records that contain the above information by telephone or in person. If the public records officer accepts such a request he or she will confirm receipt of the information and the substance of the request in writing.
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WAC 44-14-030 (4) (a)-

> "For purposes of these rules, agency rules may require the public records request to be in writing and cannot be subject to penalty or attorney's fees where it has adopted such a requirement by rule and the request is not in accord with reasonable rules, consistent with the purpose of the PDA and reasonable accommodation of physical limitations of the requesting party"

Same page and section: add a • "Where the request is for a list of items, the requestor may be required to certify that it is not for commercial purposes, consistent with RCW xxx :" [cite statute]

PROCESSING OF PUBLIC RECORDS REQUESTS--GENERAL
NEW SECTION

[redacted]

(1) **Providing "fullest assistance."** The agency is charged by statute with providing the "fullest assistance" to requestors. The
11/22/05 1:55 PM [18] OTS-8492.2
public records officer shall process requests in the order allowing the most requests to be processed in the most efficient manner.
(2) **Acknowledging receipt of request.** Within five business days of receipt of the request, the public records officer shall do one or more of the following:

(a) Make the records available for inspection or copying (or, if so requested and payment for the records is made or terms of payment are agreed upon, send the records to the requestor);
(b) Provide a reasonable estimate of when records will be available; or
(c) If the request is unclear or does not sufficiently identify the requested records, request clarification from the requestor. Such clarification may be requested and provided by telephone. The public records officer may revise the estimate of when records will be available.
(3) **Consequences of failure to respond.** If the public records officer does not respond in writing within five working days of receipt of the request for disclosure, the request may be deemed denied and the requestor may obtain internal agency review or seek judicial review of the denial. See WAC 44-14-080 (2) and (4).
(4) **Protecting rights of others.** In the event that the requested records contain information that may affect rights of others and may be exempt from disclosure, the public records officer may, prior to providing the records, give notice to such others whose rights may be affected by the disclosure. Such notice should be given so as to make it possible for those other persons to contact the requestor and ask him or her to revise the request, or, if necessary, seek an order from a court to prevent or limit the disclosure.
(5) **Records exempt from disclosure.** Some records are exempt from disclosure. If the agency believes that a record is exempt from disclosure and should be withheld, the public records officer will state the specific exemption and provide a brief explanation of why the record is being withheld. If only a portion of a record is exempt from disclosure, but the remainder is not exempt, the public records officer shall redact the exempt portions, provide the remaining portions, and indicate to the requestor ~~why portions of the record are being redacted~~ how the withheld document meets the exemption.
(6) **Inspection of records.**
(a) The (agency) shall provide space to inspect public records and provide staff assistance to make any requested copies. No member of the public may remove a document from the viewing area or disassemble or alter any document. The requestor shall indicate which documents he or she wishes to have copied.
(b) The requestor must claim or review the assembled records within thirty days of the agency's notification to him or her that the records are available for inspection or copying. If the requestor or a representative of the requestor fails to make arrangements to claim or review the records within the thirty-day period, the agency may close the request and refile the assembled records. A subsequent request for the same or almost identical records can be processed last.
(7) **Providing copies of records.** After inspection is complete, the public records officer shall make the requested copies.
(8) **Large requests.** When the request is for a large number of

records, the public records officer may provide access for inspection and copying in installments, if the officer reasonably determines that it would be practical to provide the records in that way. If, within a reasonable time, the requestor fails to inspect the entire set of records or one or more of the installments, the public records officer may stop searching for the remaining records and close the request.

(9) **Completion of inspection.** When the inspection of the requested records is complete and all requested copies are provided, or when the requestor either withdraws the request or fails to fulfill his or her obligations to inspect the records or pay the deposit or final payment for the requested copies, the public records officer shall close the request and indicate to the requestor that the (agency~~) has completed a diligent search for the requested records~~ provided the requested records, and, because the records have not been claimed, closed the request.

(10) **Later discovered documents.** If, after the (agency) has informed the requestor that it has provided all available records, the (agency) becomes aware of additional responsive documents existing at the time of the request, it shall promptly inform the requestor of the additional documents and provide them on an expedited basis, along with a written explanation of why they were not previously located and provided.

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WAC 44-14-040 (3) reference to "five working days" should be clarified to "agency working days"; some agencies observe different holidays than others. As written, not clear who defines what a "working day" is.

(4) Facilitating communication between a requestor and a protected third party may not be a great idea. Sometimes documents are requested based on the belief that the documents are relevant to dispute. Requestors should not have to subject themselves to a the reaction of the third party.

(6)(b) Requests can be processed in any order. The legal requirement is 5 days.

WAC 44-14-040 (8)- large requests- no pick up within "reasonable time"- we think 2 weeks is reasonable

WAC 44-14-040 (10)- later located documents; don't understand why the agency needs to provide a written explanation why it did not locate the documents earlier. This illustrates that there should be some good faith defense; discovery of a record after the fact, where there has been due diligence, should not subject an agency to mandatory attorneys fees and penalties. This needs to be recognized in the rules or by amendment.

(10) Does this trigger a duty to regularly review all old requests ad infinitum? That seems unduly burdensome. This section should be clarified so as to be precise about what is expected.

PROCESSING OF PUBLIC RECORDS REQUESTS--ELECTRONIC RECORDS
NEW SECTION

[redacted] (1) **General.** The process for requesting electronic records is the same as for requesting paper records, see WAC 44-14-040, with the exceptions set forth in this section.
(2) **Providing electronic records.** The public records officer may provide electronic public records either in an electronic format or by reducing the electronic records to a paper format.
(3) **Customized access to data bases.**
(a) The (agency) is not required to create a public record, create a data base or reformat or alter a data base pursuant to a requestor's search criteria in order to produce a record in a manner not maintained by the (agency) for its business purposes. The (agency) is not required to write code to respond to a public records request. The (agency) will not reconstruct a record in an electronic format if it is no longer retained in that format. The (agency) will not provide a copy of software programs or data retrieval systems it does not own and/or for which it has signed license agreements restricting the requested customized access, or provide other proprietary information protected by trade secret or other laws governing proprietary information.
(b) However, the (agency) may, in providing assistance to the requestor, choose to reformat or otherwise customize existing electronic records in a data base in order to respond to the information request. The process for customized access is provided in (c) through (f) of this subsection.
(c) In determining whether to provide such customized access to a data base, the agency will consider the following nonexclusive list of factors:
(i) The impact on staff including programming time and effort;
(ii) The (agency's) resources including specific appropriations provided to the (agency) to conduct customized programming;
(iii) The (agency's) software search capabilities;
(iv) The (agency's) ability to electronically redact or mask electronic information that is not disclosable;
(v) The (agency's) ability to respond to similar requests from other requestors;
(vi) The impact on other programming needs and data base access needs for the (agency) and the prevention of interference with other essential functions;

(vii) The need to maintain the security and integrity of the records and software including information such as source codes, security passwords, software applications and other information described and exempted from disclosure in RCW 42.17.310 (1)(h) and (ddd);
(viii) The need, if any, and ability to notify individuals referenced in the data base;
(ix) The number of data base programming requests from this requestor and/or programming time needed to respond;
(x) The alternatives to providing customized access to the requestor; and
(xi) The overall cost of such customized access.
(d) The (agency) may limit the number of customized access requests an individual may make per year, or the number of programming hours it will devote to a request.
(e) If the public records officer and the requestor agree that customized access is a reasonable means of providing access to the information requested by which the agency can provide such access given ((c) and (d) of this subsection), then, pursuant to RCW 43.105.280, the public records officer may charge the requestor for the cost of such access, including programming costs, other staff time, and other direct costs.
(f) The (agency) will publish the cost for its programming time, other staff time, and other direct costs by separate rule or schedule.
(g) The (agency) may choose to provide the electronic public records in a requested electronic format (such as a compact disk). The (agency) may choose another format if that format is consistent with its business purposes and the factors in (c) of this subsection.
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(3)(a) This is very helpful to local government. We receive requests for "hard drives" and other computer-related data which are subject to licensing restrictions.

(10)(b)-(g) - customizing access to data bases; should not have to create a clone or ghost of hard drive; not an identified record. This is not related to Public Records law and only serves to confuse agencies and citizens as to what is actually required.

EXEMPTIONS
11/22/05 1:55 PM [37] OTS-8492.2
NEW SECTION
[redacted]. (1) The Public Records Act sets forth a number of documents that are exempt from public inspection and copying in RCW 42.17.310(1) and 42.17.311 through 42.17.31915. In addition, pursuant to RCW 42.17.260(1) if any "other statute" exempts or prohibits the disclosure of specific information or

records, that law controls. Requestors should be aware of the following exemptions, outside the Public Records Act, that restrict the availability of some documents for inspection and copying:
(List other laws)
(2) The (agency) is prohibited by statute from disclosing lists of individuals for commercial purposes.
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NEW SECTION
[redacted].
(1) **Costs for paper copies.** There is no fee for inspecting public records. A requestor may obtain standard black and white photocopies for (amount) cents per page and color copies for (amount) cents per page.
If an agency decides to charge more than fifteen cents per page, use the following language: The agency charges (amount) per page for a standard black and white photocopy of a record selected by a requestor. A statement of the factors and the manner used to determine this charge is available from the public records officer. Before beginning to make the copies, the public records officer may require a deposit of up to ten percent of the estimated costs of copying all the records selected by the requestor. The public records officer may also require the payment of the remainder of the copying costs before providing all the records, or the payment of the costs of an installment before providing an installment. The (agency) may not charge sales tax of the costs of copies.
(2) **Costs for electronic records.** The cost of electronic copies of records shall be (amount) for information on a floppy disk and (amount) for information on a CD-ROM. If the request requires customized access to electronic records, the public records officer will charge the actual ~~costs~~ of such access, including staff time and other direct costs.
(3) **Costs of mailing.** The ~~public records officer~~ agency may also charge actual costs of mailing.
(4) **Payment.** Payment may be made by cash or check to "Public Records Officer (of agency)."
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(4) Check should be made to whatever is normally done by the agency.

REVIEW OF DENIALS OF PUBLIC RECORDS
NEW SECTION
[redacted]. (1) **Petition for review of denial of access.** Any person who objects to the initial denial or partial denial of a records request may petition in writing (including e-mail) to the public records officer for a review of that decision. The petition shall include or refer to the written statement by the public records officer denying the request.

(2) **Consideration of petition for review.** The public records officer shall promptly provide the petition and any other relevant information to (public records officer's supervisor or other agency official). That person shall immediately consider the petition and either affirm or reverse such denial within two business days following receipt of the petition.
(3) **(Applicable to state agencies only.) Review by the attorney general's office.** Pursuant to RCW 42.17.325, if the (state agency) denies a requestor access to public records because it claims the record is exempt from disclosure, the requestor may request the attorney general's office to review the matter. The attorney general has adopted rules on such requests in WAC 44-06-160.
(4) **Judicial review.** Court review of denials of public records request is available pursuant to RCW 42.17.340 at the conclusion of the agency internal appeal process, or two business
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days after the initial denial, whichever occurs first.
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(2) What is the authority for the two-day turnaround? Is an extension possible if needed?

Chapter 44-14 WAC
PUBLIC RECORDS ACT--MODEL RULES
INTRODUCTORY COMMENTS

NEW SECTION

WAC 44-14-00001 Statutory authority and purpose. The legislature directed the attorney general to adopt advisory model rules on public records compliance and to revise them from time to time. RCW 42.17.348 (2) and (3) (section 4(2) and (3), chapter 483, Laws of 2005). The purpose of the model rules is to provide information to records requestors and state and local agencies about "best practices" for complying with the Public Records Act, RCW 42.17.251 through 42.17.348 ("act"). The overall goal of the model rules is to establish a culture of compliance among agencies and a culture of cooperation among requestors by standardizing best practices throughout the state. The attorney general encourages state and local agencies to adopt the model rules (but not necessarily the comments) by regulation or ordinance.

The act applies to all state agencies and local units of government. These model rules use the term "agency" to refer to either a state or local agency. Upon adoption, each agency would change that term to name itself (such as changing references from "agency" to "city"). To assist state and local agencies considering adopting the model rules, an electronic version of the rules is available on the attorney general's web site, www.atg.wa.gov/records/modelrules.

The model rules are the product of an extensive outreach project. The attorney general held thirteen public forums all across the state to obtain the views of requestors and agencies. Many requestors and agencies also provided detailed written comments that are contained in the rule-making file. The model rules reflect many of the points and concerns presented in those forums.

The model rules provide one approach (or, in some cases, alternate approaches) to processing public records requests. Agencies vary enormously in size, resources, and complexity of requests received. Any "one-size-fits-all" approach in the model rules, therefore, may not be best for requestors and agencies.
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WAC 44-14-00001 - the phrase "best practices". Can't this be deleted?

NEW SECTION

WAC 44-14-00002 Format of model rules. We are publishing the model rules with comments. The comments have five-digit WAC

numbers such as WAC 44-14-05001. The model rules themselves have three-digit WAC numbers such as WAC 44-14-050.

The comments are designed to explain the basis and rationale for the rules themselves as well as provide broader context and legal guidance. The comments contain many citations to statutes, cases, and formal attorney general's opinions to provide guidance to requestors and agencies.
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NEW SECTION
WAC 44-14-00003 Model rules and comments are nonbinding. The model rules, and the comments accompanying them, are advisory only and do not bind any agency. Accordingly, many of the comments to the model rules often use the word "should" or "may" to describe what an agency or requestor is encouraged to do. The use of the words "should" or "may" are permissive, not mandatory, and are not intended to create any legal duty.

While the model rules and comments are nonbinding, they should

be carefully considered by requestors and agencies. The model rules and comments were adopted after extensive statewide hearings and voluminous comments from a wide variety of interested parties.
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This appears to be more of a rule than a comment.

NEW SECTION
WAC 44-14-00004 Recodification of the act. On July 1, 2006, the act will be recodified. Chapter 274, Laws of 2005. The act will be known as the "Public Records Act" and will be codified in chapter 42.56 RCW. The exemptions in the act are recodified and grouped together by topic. The recodification does not change substantive law. The model rules provide citations to the current act, chapter 42.17 RCW. Subsequent revisions of the model rules will contain the new citations.
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NEW SECTION
WAC 44-14-00005 Training is critical. The act is

complicated, and compliance requires training. Training can be the difference between a satisfied requestor and expensive litigation. The attorney general's office strongly encourages agencies to provide thorough and ongoing training to agency staff on public records compliance. All agency employees should receive basic training on public records compliance and records retention; public records officers should receive more intensive training.
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NEW SECTION
WAC 44-14-00006 Additional resources. Several web sites provide information on the act. The attorney general office's web site on public records is www.atg.wa.gov/records. The municipal research service center, an entity serving local governments, provides a public records handbook at www.mrsc.org/Publications/prdpub04.pdf. A requestor's organization, the Washington Coalition for Open Government, has materials on its site at www.washingtoncog.org.
The Washington State Bar Association is publishing a twentytwo-chapter deskbook on public records in 2006. It will be available at www.wsba.org.
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AUTHORITY AND PURPOSE
Comments to WAC 44-14-010
NEW SECTION
WAC 44-14-01001 Scope of coverage of Public Records Act. The act applies to an "agency." RCW 42.17.260(1). "'Agency' includes all state agencies and local agencies. 'State agency' includes every state office, department, division, bureau, board, commission, or other state agency. 'Local agency' includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency." RCW 42.17.020(1).
A court is not an "agency" subject to the act. Access to court records is governed by court rules and common law. These model rules, therefore, do not address access to court records.
An entity which is not an "agency" can still be subject to the act when it is the functional equivalent of an agency. Courts have applied a four-factor, case-by-case test. The factors are:
(1) Whether the entity performs a government function;

(2) The level of government funding;
(3) The extent of government involvement or regulation; and
(4) Whether the entity was created by the government. Op. Att'y Gen. 2 (2002).[2]
Some agencies, most notably counties, are a collection of separate quasi-autonomous departments which are governed by different elected officials (such as a county assessor and

prosecuting attorney). However, the act defines the county as a whole as an "agency" subject to the act. RCW 42.17.020(1). The act requires an agency to coordinate responses to records requests across departmental lines. RCW 42.17.253(1) (2005).

Notes: [1] *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986).
[2] *See also Telford v. Thurston County Bd. of Comm'rs*, 95 Wn. App. 149, 162, 1974 P.2d 886, *review denied*, 138 Wn.2d 1015, 989 P.2d 1143 (1999); Op. Att'y Gen. 5 (1991).

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NEW SECTION
WAC 44-14-01002 Requirement that agencies adopt reasonable regulations for public records requests. The act provides: "Agencies shall adopt and enforce reasonable rules and regulations . . . to provide full public access to public records, to protect public records from damage or disorganization, and to prevent excessive interference with other essential functions of the agency . . .. Such rules and regulations shall provide for the fullest assistance to inquirers and the most timely possible action on requests for information." RCW 42.17.290. Therefore, an agency must adopt "reasonable" regulations providing for the "fullest assistance" to requestors and the "most timely possible action on requests."
At the same time, an agency's regulations must "protect public records from damage or disorganization" and "prevent excessive interference" with other essential agency functions. Another provision of the act provides that providing public records should not "unreasonably disrupt the operations of the agency." RCW 42.17.270. This provision allows an agency to take reasonable precautions to prevent a requestor from being disrespectful to agency staff.
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NEW SECTION
WAC 44-14-01003 Construction and application of act. The act declares: "The people of this state do not yield their sovereignty

to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW 42.17.251. The act further provides: ". . . mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17.010(11). The act also provides, "Courts shall take into account the policy of (the act) that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.17.340(3). Because the purpose of the act is to allow people to be informed about governmental decisions (and therefore help keep government accountable) while at the same time being "mindful of the right of individuals to privacy," it should not be used to obtain records containing purely personal information that has absolutely no bearing on the conduct of government.
The act emphasizes three separate times that it must be liberally construed to effect its purpose, which is the disclosure of nonexempt public records. RCW 42.17.010, 42.17.251, 42.17.920.[1] The act places the burden on the agency of proving a record is not subject to disclosure or that its estimate of time to provide a full response was "reasonable." RCW 42.17.340 (1) and (2). The act also encourages disclosure by awarding a requestor reasonable attorneys fees, costs, and a daily penalty if the agency fails to meet its burden of proving the record is not subject to disclosure or its estimate was not "reasonable." RCW 42.17.340(4).

Note: [1]*See King County v. Sheehan*, 114 Wn. App. 325, 338, 57 P.3d 307 (2002) (referring to the three legislative intent provisions of the act as "the thrice-repeated legislative mandate that exemptions under the Public Records Act are to be narrowly construed.").

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WAC 44-14-01003 - delete the editorial in parentheses "(and therefore help keep government accountable).

WAC 44-14-01003: guiding tests for application of the PDA

a. open government
b. not avoid disclosure to protect public officials from inconvenience or embarrassment
c. protect individual privacy and personal information not related to the conduct of government
d. the desirability of efficient administration of government
e. prevent excessive interference in essential agency functions

Further comment on WAC- burden of proof to show estimate of response time was "reasonable": can use same criteria as #5

Comments to WAC 44-14-020
NEW SECTION
11/22/05 1:55 PM [9] OTS-8492.2
WAC 44-14-02001 Agency must publish its procedures. An agency must publish its public records policies, organizational information, and methods for requestors to obtain public records. RCW 42.17.250(1).[1] A state agency must publish its procedures in the Washington Administrative Code and a local agency must prominently display and make them available at each of its offices. RCW 42.17.250 (1)(a). An agency cannot invoke a procedure if it did not publish it as required. RCW 42.17.250(2).
Note: [1]*See, e.g.*, WAC 44-06-030 (attorney general office's organizational and public records methods statement).
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Page 9: WAC 44-14-02001: website posting meets publication requirement

NEW SECTION
WAC 44-14-02002 Public records officers. An agency must appoint a public records officer whose responsibility is to serve as a "point of contact" for members of the public seeking public records. RCW 42.17.253(1). The purpose of this requirement is to provide the public with one point of contact within the agency to make a request. A state agency must provide the public records officer's name and contact information by publishing it in the state register. A state agency is encouraged to provide the public records officer's contact information on its web site. A local agency must publish the public records officer's name and contact information in a way reasonably calculated to provide notice to the public such as posting it on the agency's web site. RCW 42.17.253(3).
The public records officer is not required to personally fulfill requests for public records. A request can be fulfilled by an agency employee other than the public records officer. If the request is made to the public records officer, but should actually be fulfilled by others in the agency, the public records officer should route the request to the appropriate person(s) in the agency for processing. An agency is not required to hire a new staff member to be the public records officer.
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Page 9: WAC 44-14-02002: City Clerk is point of contact; need not fill all requests personally; can refer to different city departments

Comments to WAC 44-14-030
NEW SECTION
WAC 44-14-03001 "Public record" defined. Courts use a threepart test to determine if a record is a "public record." The document must be: A "writing," containing information "relating to the conduct of government" or the performance of any governmental or proprietary function, "prepared, owned, used, or retained" by an agency.[1]
(1) **Writing.** A "public record" can be any writing "regardless of physical form or characteristics." RCW 42.17.020(41). "Writing" is defined very broadly as: ". . . handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation, including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated." RCW 42.17.020(48).
(2) **Relating to the conduct of government.** To be a "public record," a document must relate to the "conduct of government or the performance of any governmental or proprietary function." RCW 42.17.020(41). Almost all records held by an agency relate to the
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conduct of government; however, some do not. A purely personal record having no relation to the conduct of government is not a "public record." Even though a purely personal record might not be a "public record," a record of its existence might be. For example, a record showing the existence of a purely personal e-mail sent by an agency employee on an agency computer would probably be a "public record," even if the contents of the e-mail itself is not.[2]
(3) **"Prepared, owned, used, or retained."** A "public record" is a record "prepared, owned, used, or retained" by an agency. RCW 42.17.020(41).
A record can be "used" by an agency, even if the agency does not actually possess the record. If an agency uses a record in its decision-making process it is a "public record."[3] For example, if an agency considered technical specifications of a public works project and returned the specifications to the contractor in

another state, the specifications would be a "public record" because the agency "used" the document in its decision-making process.[4] The agency would be responsible for obtaining the public record, unless doing so would be impossible. An agency cannot send its only copy of a record to a third party for the sole purpose of avoiding disclosure.[5]

Sometimes agency employees work on agency business from home computers. Because these records were "used" by the agency and relate to agency business, the home-computer documents (which include e-mail) are "public records" because they relate to the "conduct of government." RCW 42.17.020(41). However, the act does not authorize unbridled searches of agency property.[6] If agency property is not subject to unbridled searches, then neither is the home computer of an agency employee. However, because the homecomputer documents relating to agency business are "public records," they are subject to disclosure (unless exempt). Agencies should instruct employees that all public records, regardless of where created, should eventually be stored on agency computers. Agencies should ask employees to keep agency-related documents on home computers in separate folders and to routinely blind carbon copy ("bcc") work e-mails back to the employee's agency e-mail account. If the agency receives a request for records that are solely on employees' home computers, the agency should direct the employee to forward any responsive documents back to the agency, and the agency should process the request as it would if the records were on the agency's computers.

Notes: 1 *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 735, 748, 958 P.2d 260 (1998). For records held by the secretary of the senate or chief clerk of the house of representatives, a "public record" is a "legislative record" as defined in RCW 40.14.100. RCW 42.17.020(41).

2 *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 13 P.3d 1104 (2000).

3 *Concerned Ratepayers v. Public Utility District No. 1*, 138 Wn.2d 950, 958-61, 983 P.2d 635 (1999).

4 *Id.*

5 *See* Op. Att'y Gen. 11 (1989), at 4, n.2 ("We do not wish to encourage agencies to avoid the provisions of the public disclosure act by transferring public records to private parties. If a record otherwise meeting the statutory definition were transferred into private hands solely to prevent its public disclosure, we expect courts would take appropriate steps to require the agency to make disclosure or to sanction the responsible public officers.")

6 *See Hangartner v. City of Seattle*, 151 Wn.2d 439, 448, 90 P.3d 26 (2004).

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page 12 (3), first ¶ add:

> "For purposes of these rules, a good faith effort using reasonable diligence by an agency to obtain a record from a third party comprises compliance with the PDA. This does not apply if an agency sends its only copy of a record to a third party for the sole purpose of avoiding disclosure."

page 12 (3), second ¶: Needs rewriting:

> Agency employees using home computers for agency business are responsible to keep agency files segregated. Only such files contain public records. The employee is responsible to forward agency files if there is a request for such records.

NEW SECTION
WAC 44-14-03002 Times for inspection and copying of records.
An agency must make records available for inspection and copying during the "customary office hours of the agency." RCW 42.17.280. If the agency is very small and does not have customary office hours of at least thirty hours per week, the records must be available from 9:00 a.m. to noon, and 1:00 p.m. to 4:00 p.m. However, the agency and requestor can make mutually agreeable arrangements for the times of inspection and copying.
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NEW SECTION
WAC 44-14-03003 Index of records. State and local agencies are required by RCW 42.17.260 to provide an index for certain categories of records. An agency is not required to index every record it creates. Since agencies maintain records in a wide variety of ways, agency indices will also vary. An agency cannot rely on or cite to a public record unless it was indexed or made available to the parties affected by it. RCW 42.17.260(6). An agency should post its index on its web site.
The index requirements differ for state and local agencies.
A state agency must index only two categories of records:
(1) All records, if any, issued before July 1, 1990 for which the agency has maintained an index; and
(2) Final orders, declaratory orders, and interpretative statements of policy issued before June 30, 1990. RCW 42.17.260(5).
A state agency must adopt a rule governing its index.
A local agency may opt out of the indexing requirement if it

issues an order or adopts an ordinance specifying the reasons why doing so would be "unduly burdensome" or "interfere with agency operations." RCW 42.17.260(4). To lawfully opt out of the index requirement, a local agency must actually issue such an order or adopt an ordinance specifying the reasons it cannot maintain an index.
The index requirements of the act were enacted in 1972 when agencies had far fewer records and an index was easier to maintain. However, technology allows agencies to map out, archive, and then electronically search for electronic documents. Agency resources

vary greatly so not every agency can afford to utilize this technology. However, agencies should explore the feasibility of electronic indexing and retrieval to assist both the agency and requestor in locating public records.
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WAC 44-14-03003 - last line necessary? Agencies should explore . . .

NEW SECTION
WAC 44-14-03004 Organization of records. An agency must "protect records from damage or disorganization." RCW 42.17.290. An agency owns public records and must maintain custody of them. RCW 40.14.020; chapter 434-615 WAC. Therefore, an agency should not allow a requestor to take originals of agency records out of the agency's office. An agency may send originals to a reputable commercial copying center to fulfill a records request if the agency takes reasonable precautions to protect the records. See WAC 44-14-07001(5).
The legislature encourages agencies to electronically store and provide public records:
Broad access to state and local government records and information has potential for expanding citizen access to that information and for providing government services. Electronic methods of locating and transferring information can improve linkages between and among citizens . . . and governments. . . . It is the intent of the legislature to encourage state and local governments to develop, store, and manage their public records and information in electronic formats to meet their missions and objectives. Further, it is the intent of the legislature for state and local governments to set priorities for making public records widely available electronically to the public.
RCW 43.105.250. As more fully described in WAC 44-14-04023, an

agency fulfills its obligation to provide "access" to a public record by providing a requestor with a link to an agency web site containing an electronic copy of that record. Agencies are encouraged to do so.
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NEW SECTION
WAC 44-14-03005 Retention of records. An agency is not required to retain every record it ever created or used. Retention

schedules determine when records can lawfully be destroyed.[1] The secretary of state adopts retention schedules for general classes of records for state and local agencies. See chapter 434-615 WAC. Individual agencies are required to adopt retention schedules for their own records. The retention schedule for local agencies is available at www.secstate.wa.gov/archives/gs.aspx.
Retention schedules vary based on the content of the record. For example, documents with no value such as internal meeting scheduling e-mails can be destroyed instantly but documents such as periodic accounting reports must be kept for a period of years. Because different kinds of records must be retained for different periods of time, an agency is prohibited from automatically deleting all e-mails after a short period of time (such as thirty days). While many of the e-mails could be destroyed instantly, many others must be retained for several years. Indiscriminate automatic deletion after a short period prevents an agency from complying with its retention duties and its public records duties. An agency should have a retention policy in which employees save retainable documents and delete nonretainable ones. An agency is strongly encouraged to train employees on retention schedules.
The lawful destruction of public records is governed by retention schedules. The unlawful destruction of public records can be a crime. RCW 40.16.010 and 40.16.020.
An agency is prohibited from destroying a public record, even if it is about to be lawfully destroyed under a retention schedule, if a public records request has been made for that record. RCW 42.17.290. The agency is required to retain the record until the record request has been resolved. An exception is for certain portions of a state employee's personnel file. RCW 42.17.295.
Note: [1]An agency can be found to violate the act and be subject to the attorneys' fees and penalty provision if it prematurely destroys a requested record. See *Yacobellis v. City of Bellingham*, 55 Wn. App. 706, 780 P.2d 272 (1989).
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Page 15: WAC 44-14-03005- email retention comments vague and hard to apply. It would be most helpful to try and get a range of acceptable practices, to be confirmed by adoption of local rules. Our data people cannot respond to vague guidelines. Vague, editorial-type guidelines are harmful because they generate lawsuits.

Examples: "some emails may be instantly deleted" but "an agency is prohibited from automatically deleting all emails after a short period of time (such as thirty days)" and "indiscriminate automatic deletion after a short period" offer no help and are a disservice to the public. What is "indiscriminate"? What is "short"? What are "some" emails? Why is a 30 day policy automatically wrong? When might it be OK?

SUGGEST: "If an email is not needed or used in the conduct of government business after being sent, it may be deleted. If it is needed or used for further government business, it should be preserved in accord with the applicable retention schedule set by Secretary of State or written government agency policy."

FURTHER COMMENT: Sec State retention policies should be reviewed for consistency with AG proposed rules. There should also be a process for an agency to request an interpretation of the rules. Most agencies are happy to comply, but the statues are not easy to apply sometimes, so an interpretation service could be very valuable/important and help establish uniform practices; the rules better understood and followed by all.

NEW SECTION

WAC 44-14-03006 Form of requests. There is no statutorily required format for a valid public records request. A request can be sent in by mail. RCW 42.17.290. A request can also be made by e-mail, fax, or verbally. A request should be made to the agency's public records officer. An agency may prescribe means of requests in its rules. RCW 42.17.250 and 42.17.260(1); RCW 42.17.060 (relating to certain state agencies); RCW 34.05.220 (authority for all state agencies). An agency is encouraged to make its public records request form available on its web site.

Verbal requests may be allowed but are problematic. A verbal request does not memorialize the exact records sought and therefore, prevents a requestor or agency from later proving what was included in the request. Furthermore, as described in WAC 44-14-05003(1), a requestor must provide the agency with reasonable notice that the request is for public records; verbal requests, especially to agency staff other than the public records officer, may not provide the agency with the required reasonable notice. Therefore, requestors are strongly encouraged to make written requests. If an agency receives a verbal request, the agency staff person receiving it should immediately reduce it to writing and then verify in writing with the requestor that it correctly memorializes the request.

An agency should have a public records request form. An agency request form should ask the requestor whether he or she seeks to inspect the records, receive a copy of them, or to inspect the records first and then consider selecting records to copy. An agency request form should recite that inspection of records is free and provide the per-page charge for standard photocopies. An agency request form should require the requestor to provide contact information so the agency can communicate with the requestor to, for example, clarify the request, inform the requestor that the records are available, or provide an explanation of an exemption. Contact information such as a name, phone number,

and address or e-mail should be provided. Requestors should provide an e-mail address because it is an efficient means of communication and creates a permanent record. An agency should not require a requestor to provide a driver's license number, date of birth, or photo identification. This information is not necessary for the agency to contact the requestor and requiring it might
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intimidate some requestors.
An agency may ask a requestor to prioritize the records he or she is requesting so that the most important records are provided first. An agency is not required to ask for prioritization, and a requestor is not required to provide it.
An agency cannot require the requestor to disclose the purpose of the request with two exceptions. RCW 42.17.270. First, if the request is for a list of individuals, an agency may ask the requestor if he or she intends to use the records for a commercial purpose and intends to directly contact or personally affect the individuals named in a list.[2] An agency should specify on its request form that the agency is not required to provide public records consisting of a list of individuals for a commercial use. RCW 42.17.260(9).
Second, an agency may seek information sufficient to allow it to determine if another statute prohibits disclosure. For example, some statutes allow an agency to disclose a record only to a claimant for benefits or his or her representative. In such cases, an agency is authorized to ask the requestor if he or she fits this criterion and treat him or her differently than someone who does not.
An agency is not authorized to require a requestor to indemnify the agency. Op. Att'y Gen. 12 (1988).[3]

Notes: [1]*Hangartner v. City of Seattle*, 151 Wn.2d 439, 447, 90 P.3d 26 (2004) ("there is no official format for a valid PDA request.").
[2]Op. Att'y Gen. 12 (1988), at 11; Op. Att'y Gen. 2 (1998), at 4.
[3]An agency and its employees are immune from any liability for acting in good faith to fulfill a public records request so an agency has little need for an indemnification clause. RCW 42.17.258. Requiring a requestor to indemnify an agency inhibits some requestors from exercising their right to request public records. Op. Att'y Gen. 12 (1988), at 11.

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Page 16, WAC 44-14-03006:

Verbal requests should not be an option as a PDA request if the agency does not accept them. It should be made clear that an agency, by its procedures, may require a public records request to be in writing and may require the requesting party to identify themselves and how they may be contacted for a response. COMPARE WAC 44-14-030 (4)- "request should be in writing"

Proposed statutory amendment/clarification: "if the requesting party does not put a request in writing per local agency rule and does not provide a name and contact information, the request may be disregarded."

This is not inconsistent with the statute: it is impossible to help someone if they cannot be contacted or if there is no record of the request. It should not be the burden of the government agency to have a stenographer or shorthand writer to scribble out verbal requests; transcribe voicemails etc.

p. 17 WAC 44-14-03006, second to last paragraph; when agency may require disclosure of purpose of request- incorporate this point in WAC 44-14-030 (4)

p. 17- if an individual violates the 2 restrictions given, the agency should not have to continue to respond to his requests, since he should not be allowed to rely upon the law to violate the law- this should be included in rules

WAC 44-14-03006 - 2nd paragraph another reference to verbal requests and staff reduce to writing.

Comments on WAC 44-14-040
NEW SECTION
WAC 44-14-04001 Introduction. Both requestors and agencies have responsibilities under the act. The public records process can function properly only when both parties perform their respective responsibilities. An agency has a duty to promptly provide access to all nonexempt public records.[1] A requestor has a duty to request identifiable records, inspect the assembled
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records or pay for the copies, and be respectful to agency staff.[2] Requestors should keep in mind that all agencies have essential functions in addition to providing public records. Agencies also have greatly differing resources. The act recognizes that agency public records procedures should prevent "excessive interference" with the other "essential functions" of the agency. RCW 42.17.290. Therefore, while providing public records is an essential function of an agency, it is not required to abandon its other, nonpublic records functions. Agencies without a full-time public records officer may assign staff part-time to fulfill records requests, provided the agency is providing the "fullest assistance" and the "most timely possible" action on the request. The proper level of staffing for public records requests will vary among agencies, considering the complexity and number of requests

to that agency, agency resources, and the agency's other functions. Since the burden of proof is on an agency to prove its estimate of time to provide a full response is "reasonable" (RCW 42.17.340(2)), an agency should be prepared to explain how its response to a request provided the requestor the "fullest assistance."

The act began as an initiative in 1972. Requestors and agencies should bear in mind that many of the technologies contemplated by the act are several decades old. For example, the act's original reference to a "record" contemplated a piece of paper, not modern electronic records.[3] Similarly, the act's focus on charging for printed photocopies of paper records did not contemplate agencies providing records electronically.

Agencies are encouraged to use technology to provide public records more quickly and, if possible, less expensively. It is permissible to "over comply" with the act. Doing so often saves the agency time and money in the long run, improves relations with the public, and prevents litigation. For example, agencies are encouraged to post many nonexempt records of broad public interest on the internet. This may result in fewer requests for public records. See RCW 43.105.270 (state agencies encouraged to post frequently sought documents on the internet).

Notes: [1] RCW 42.17.260(1) (agency "shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions" listed in the act or other statute).

[2] *See* RCW 42.17.270 ("identifiable record" requirement); RCW 42.17.300 (2005) ("claim or review" requirement); RCW 42.17.290 ("agency may prevent excessive interference with other essential agency functions").

[3] However, now the act clearly contemplates electronic records. *See* RCW 42.17.020(48) (definition of "writing").

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p. 19 WAC 44-14-04001- duty of requestor to request identifiable record: should acknowledge here that a request to inspect "unallocated hard drive" is not a request for a record but the file cabinet. Public records act not a fishing license. Must request an identifiable record. Should make it clear that unallocated hard drive is not an "identifiable record".

WAC 44-14-04001 - last paragraph. Delete sentence allowing "over compliance" with the PDA.
WAC 44-14-04003(3) - 2nd paragraph delete "should provide periodic updates" and (4) delete any suggestion to create document to respond to request.

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NEW SECTION

WAC 44-14-04002 Obligations of requestors. (1) **Reasonable notice that request is for public records.** A requestor must give an agency reasonable notice that the request is being made pursuant to the act.[1] While the request need not cite or name the act, it must alert the agency that it is a request for public records. A request using the terms "public records," "public disclosure,"

"FOIA," or "Freedom of Information Act" (the terms commonly used for federal records requests) should provide an agency with reasonable notice in most cases. A requestor should not submit a "stealth" request, which is buried in another document in an attempt to trick the agency into not responding.

(2) **Identifiable record.** A requestor must request an "identifiable record" or "class of records" before an agency must respond to it. RCW 42.17.270 and 42.17.340(1). An "identifiable record" is one that agency staff can reasonably locate.[2] The act does not allow a requestor to search through agency files for records which cannot be reasonably identified or described to the agency.[3] However, a requestor is not required to identify the exact record he or she seeks. For example, if a requestor requested an agency's "2001 budget," but the agency only had a 2000-2002 budget, the requestor made a request for an identifiable record.[4] The agency must provide the requestor the "fullest assistance."

An "identifiable record" is not a request for "information" in general, but rather for a record that can be reasonably located.[5] For example, asking "what policies" an agency has for handling discrimination complaints is merely a request for "information."[6] A request to inspect or copy an agency's policies and procedures for handling discrimination complaints would be a request for an "identifiable record."

Public records requests are not interrogatories. An agency is not required to conduct legal research for a requestor.[7] A request for "any law that allows the county to impose taxes on me" is not a request for an identifiable record. Conversely, a request for "all records discussing the passage of this year's tax increase on real property" is a request for an "identifiable record."

When a request uses an inexact phrase such as all records "relating to" a topic (such as "all records relating to the property tax increase"), the agency may interpret the request to be for records which directly and fairly address the topic. When an agency receives a "relating to" or similar request, it should seek to clarify the request with the requestor.

(3) **"Overbroad" requests.** An agency cannot "deny a request for identifiable records based solely on the basis that the request is overbroad." RCW 42.17.270 (2005). If the request is not for identifiable records or is otherwise not proper, the request can still be denied. When confronted with a large request that is unclear, an agency should seek clarification.

Notes: [1] *Wood v. Lowe*, 102 Wn. App. 872, 10 P.3d 494 (2000).

[2] *Bonamy v. City of Seattle*, 92 Wn. App. 403, 410, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999) ("identifiable record" requirement is satisfied when there is a "reasonable description" of the record "enabling the government employee to locate the requested records.").

[3] *Limstrom v. Ladenburg*, 136 Wn.2d 595, 604, n.3, 963 P.2d 869 (1998), *appeal after remand*, 110 Wn. App. 133, 39 P.3d 351 (2002).

[4] *Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, n.4, 59 P.3d 109 (2002).

[5] *Bonamy*, 92 Wn. App. at 409.

[6] *Id.*

[7] *See Limstrom*, 136 Wn.2d at 604, n.2 (act does not require "an agency to go outside its own records and resources to try to identify or locate the record requested."); *Bonamy*, 92 Wn. App. at 409 (act "does not require agencies to research or explain public records, but only to make those records accessible to the public.").

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p. 21 WAC 44-14-04002- Good point about "stealth request". I would like to see added that a party cannot make a "trip you up" request for a record when it already has it- should not be awarded penalties and attorneys fees; this actually happened to the City of Spokane

p. 21 WAC 44-14-04002 (2)- issue of a record being about to be reasonably located: an agency should not have to use software to reconstruct a record (eg. a deleted electronic file). "Reasonably locate" should be stated to mean "without the aid of special software".

p. 21 WAC 44-14-04002 (3)- "overbroad"- the law here is that an agency cannot deny a request solely on the basis of being overbroad. An overbroad request may be denied as an additional, supporting reason. As worded, this provision is not accurate.

NEW SECTION

WAC 44-14-04003 Responsibilities of agencies in processing requests. (1) **Similar treatment and purpose of the request.** The act provides: "Agencies shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request" (except to determine if the request is for a "commercial use or would violate another statute prohibiting disclosure"). RCW 42.17.270.[1] The act also requires an agency to take the "most timely possible action on requests" and make records "promptly available." RCW 42.17.290 and 42.17.270. However, treating requestors similarly does not mean that agencies must process requests strictly in the order received because this might not be providing the "most timely possible action" for all requests. A relatively simple request need not wait for a long period of time while a much larger request is being fulfilled. Agencies are encouraged to be flexible and process as many requests as possible even if they are out of order.[2]
An agency cannot require a requestor to state the purpose of the request (with limited exceptions). RCW 42.17.270. However, in an effort to better understand the request and provide all responsive records, the agency can inquire about the purpose of the request. The requestor is not required to answer the agency's inquiry (with limited exceptions as previously noted).
(2) **Provide "fullest assistance" and "most timely possible**

action." The act requires agency procedures to provide the "fullest assistance" to a requestor. RCW 42.17.290. The "fullest assistance" requirement should guide agencies when a specific question is not directly addressed by the act or model rules. "Fullest assistance" can take many forms. In general, an agency should devote sufficient staff time to processing records requests, consistent with the act's requirement that fulfilling requests should not be an "excessive interference" with the
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agency's "other essential functions." RCW 42.17.290. "Fullest assistance" means the agency should recognize that fulfilling public records requests is one of the agency's duties, along with its others.

The act also requires an agency to provide the "most timely possible action on requests." RCW 42.17.290. This provision should also guide agencies in all aspects of public records compliance. It should be noted that this provision requires the most timely "possible" action on requests. This provision recognizes that an agency is not always capable of fulfilling a request as quickly as the requestor would like.

(3) **Communicate with requestor.** Communication is usually the key to a smooth public records process for both requestors and agencies. Clear requests for a small number of records usually do not require predelivery communication with the requestor. However, when an agency receives a large or unclear request, the agency should communicate with the requestor to clarify the request and explain the public records process. The model rules and comments should help explain the process to requestors.

For large requests, the agency may ask the requestor to prioritize the request so that he or she receives the most important records first. If feasible, the agency should provide periodic updates to the requestor of the progress of the request. Similarly, the requestor should periodically communicate with the agency and promptly answer any clarification questions. Sometimes a requestor finds the records he or she is seeking at the beginning of a request. If so, the requestor should communicate with the agency that the requested records have been provided and that he or she is canceling the remainder of the request. If the requestor's cancellation communication is not in writing, the agency should confirm it in writing

(4) **No duty to create records.** An agency is not obligated to create a new record to satisfy a records request.[3] However, sometimes it is easier for an agency to create a record than find itself in a controversary about whether the request requires the creation of a new record. The decision to create a new record is left to the discretion of the agency.

(5) **Provide a reasonable estimate of the time to fully**

respond. Unless it is providing the records or claiming an exemption from disclosure within the five-business day period, an agency must provide a reasonable estimate of the time it will take to fully respond to the request. RCW 42.17.320. Fully responding can mean processing the request (assembling records, redacting, preparing a witholding index, or notifying third parties named in the records who might seek an injunction against disclosure) or determining if the records are exempt from disclosure.

An estimate must be "reasonable." The act provides a requestor a quick and simple method of challenging the reasonableness of an agency's estimate. RCW 42.17.340(2). See WAC 44-14-08008(2). The burden of proof is on the agency to prove its estimate is "reasonable." RCW 42.17.340(2).

To provide a "reasonable" estimate, an agency should not use

the same estimate for every request. An agency should roughly calculate the time it will take to respond to the request and send estimates of varying lengths, as appropriate. Some very large requests can legitimately take months or longer to provide. There is no standard amount of time for fulfilling a request so reasonable estimates should vary.

Some agencies send form letters with thirty-day estimates to all requestors, no matter the size or complexity of the request. Form letter thirty-day estimates are almost never "reasonable" because an agency, which has the burden of proof, could not prove that every single request it receives would take the same thirtyday period.

In order to avoid unnecessary litigation over the reasonableness of an estimate, an agency should briefly explain to the requestor the basis for the estimate in the initial response. The explanation need not be elaborate but should allow the requestor to make a threshold determination of whether he or she should question that estimate further or has a basis to seek judicial review of the reasonableness of the estimate.

An agency should either fulfill the request within the estimated time or, if warranted, communicate with the requestor about clarifications or the need for a revised estimate. An agency should not ignore a request and then continuously send extended estimates. Routine extensions with little or no action to fulfill the request would show that the previous estimates probably were not "reasonable." Extended estimates are appropriate when the circumstances have changed (such as an increase in other requests or discovering that the request will require extensive redaction). An estimate can be revised when appropriate, but unwarranted serial extensions have the effect of denying a requestor access to public records.

(6) **Seek clarification of a request or additional time.** An

agency may seek a clarification of an "unclear" request. RCW 42.17.320. An agency can only seek a clarification when the request is objectively "unclear." Seeking a "clarification" of an objectively clear request delays access to public records. If the requestor fails to clarify an unclear request, the agency need not respond to it further. RCW 42.17.320. If the requestor does not respond to the agency's request for a clarification within thirty days of the agency's request, the agency may consider the request abandoned. If the agency considers the request abandoned, it should send a closing letter to the requestor.

An agency may take additional time to provide the records or deny the request if it is awaiting a clarification. RCW 42.17.320. After providing the initial response and perhaps even beginning to assemble the records, an agency might discover it needs to clarify a request and is allowed to do so. A clarification could also affect a reasonable estimate.

(7) **Preserving requested records.** If a requested record is scheduled shortly for destruction, and the agency receives a public records request for it, the record cannot be destroyed until the

request is resolved. RCW 42.17.290.[4] Once a request has been closed, the agency can destroy the requested records in accordance with its retention schedule.

(8) **Searching for records.** An agency must conduct an objectively reasonable search for responsive records. A requestor is not required to "ferret out" records on his or her own.[5] A reasonable agency search usually begins with the public records officer for the agency or a records coordinator for a department of the agency deciding where the records are likely to be and who is likely to know where they are. One of the most important parts of an adequate search is to decide how wide the search will be. If the agency is small, it might be appropriate to ask all agency employees if they have responsive records. If the agency is larger, the agency may choose only to ask the staff of the department or departments of an agency most likely to have the records. For example, a request for records showing or discussing payments on a public works project initially might be directed to all staff in the finance and public works departments if those departments are deemed most likely to have the responsive documents, even though other departments may have copies or alternative versions of the same documents. However, the other departments that may have documents should be instructed to preserve their records in case they are later deemed to be necessary to respond to the request. The agency could notify the requestor of which departments are being surveyed for the documents so the requestor may suggest that to other departments. It is

better to be over inclusive rather than under inclusive when deciding which staff should be contacted, but not everyone in an agency needs to be asked if there is no reason to believe he or she has responsive records. An e-mail to staff selected as most likely to have responsive records is usually sufficient. Such an e-mail also allows an agency to document whom it asked for records. Agency policies should require staff to promptly respond to inquiries about responsive records from the public records officer. Agency staff must provide the "fullest assistance" to requestors and replying to inquiries from the public records officer about the existence of records is one way to do so.

After seemingly responsive records are located, an agency should take reasonable steps to narrow down the number of records to those which are responsive. In some cases, an agency might find it helpful to consult with the requestor on the scope of the documents to be assembled. An agency cannot "bury" a requestor with nonresponsive documents. However, an agency is allowed to provide arguably, but not clearly, responsive records to allow the requestor to select the ones he or she wants, particularly if the requestor is unable or unwilling to help narrow the scope of the documents.

(9) **Expiration of reasonable estimate.** An agency can provide a record within the time provided in its reasonable estimate or can communicate with the requestor to obtain additional time to fulfill the request based on specified criteria. Unless the agency properly obtains additional time to fulfill the request, the agency

is obligated to provide the record within the reasonable estimate period. Failure to do so is a denial of access to the record.

(10) **Notice to affected third parties.** Sometimes an agency decides it must release all or a part of public record affecting a third party. The third party can file an action to obtain an injunction to prevent an agency from disclosing it, but the third party must prove the record or portion of it is exempt from disclosure.[6] RCW 42.17.330.

The act provides that before releasing a record an agency may, at its "option," provide notice to a person named in a public record or to whom the record specifically pertains. RCW 42.17.330. This would include all of those whose identity could reasonably be ascertained in the record and who might have a reason to seek to prevent the release of the record. An agency has wide discretion to decide whom to notify or not notify. First, an agency has the "option" to notify or not. RCW 42.17.330. Second, an agency cannot be held liable for its failure to notify enough people under the act. RCW 42.17.258. However, if an agency had a contractual obligation to provide notice of a request but failed to do so, the agency might lose the immunity provided by RCW 42.17.258 because

breaching the agreement probably is not a "good faith" attempt to comply with the act.
The standard notice is ten days. More notice might be appropriate in some cases, such as when numerous notices are required, but every additional day of notice is another day the potentially disclosable record is being withheld. When it provides a notice, the agency should include the notice period in the "reasonable estimate" it provides to requestors.
The notice informs the third party that release will occur on the stated date unless he or she obtains an order from a court enjoining release. The requestor has an interest in any legal action to prevent the disclosure of the records he or she requested. Therefore, the agency's notice should inform the third party that he or she should name the requestor as a party to any action to enjoin disclosure. If an injunctive action is filed, the third party or agency should name the requestor as a party or, at a minimum, must inform the requestor of the action to allow the requestor to intervene.

Notes: 1*See also* Op. Att'y Gen. 2 (1988).
2While an agency can fulfill requests out of order, an agency is not allowed to ignore a large request while it is exclusively fulfilling smaller requests. The agency should strike a balance between fulfilling small and large requests.
3*Smith v. Okanogan County*, 100 Wn. App. 7, 14, 994 P.2d 857 (2000).
4An exception is some state-agency employee personnel records. RCW 42.17.295.
5*Daines v. Spokane County*, 111 Wn. App. 342, 349, 44 P.3d 909 (2002) ("an applicant need not exhaust his or her own ingenuity to 'ferret out' records through some combination of 'intuition and diligent research'").
6The agency holding the record can also file a Section 330 injunctive action to establish that it is not required to release the record or portion of it.
Before sending a notice, an agency should have a reasonable belief that the record is arguably exempt. Notices to affected third parties when the records could not reasonably be considered exempt might have the effect of unreasonably delaying the requestor's access to a disclosable record.
[]

WAC 44-14-04003 - (8) towards end of 1st paragraph - delete "agency should notify requestor of which departments surveyed for documents so the requestor can suggest other departments." Extra work for staff, and creates expectation.

p. 24 WAC 44-14-04003 (6) "seek clarification"- Could this work in response to a request "all your records" ? Can an agency "seek clarification" on the basis of overbreadth? It seems like the comments are saying this indirectly. Why not just say it directly?

p. 25 WAC 44-14-04003 (8)- Searching for records- these are good comments, but it would be appropriate here to state that it is a defense to a claim for failure to disclose where an agency can document it applied a due diligence search effort, making a reasonable effort; following AG model rules etc. It should be stated that the PDA is not a "strict liability" statute, holding government out to damages and attorneys fees, no matter how hard the effort was made. An agency should not have to take extraordinary measures; again, the example of buying special software to recover deleted documents should not be a PDA obligation.

p. 26 WAC 44-14-04003(9)- Sentence "Failure to do so [supply record within estimated time] is a denial of access to the record." Should be stricken. This is an example of the strict liability concept. An *estimate* is just that: a guess based on reasonable projection. Even contract performance is excused by *force majeure.* Elsewhere in the rules the idea of extension of time is discussed. Because an agency needs to extend time does not mean it has denied access. It means it needs more time.

Recommendation: penalties and attorneys fees are mandatory. There is no need to remind agencies of their duty. An agency should not be automatically at fault if there is some reasonable basis for it needing extension: public records clerk is ill; fire or poor weather delays ability to respond etc.

COMPARE: p. 28 WAC 44-14-05004 (4) language "or... Does not provide the record after the reasonable estimate expires without the agency seeking additional time to provide the record." Agency should be able to notify the requestor it needs additional time; still being ultimately responsible not to abuse this procedure.

p. 26 WAC 44-14-04003 (10)- 10 day notice to 3rd party: delete gratuitous comment "every additional day of notice is another day the potentially disclosable record is withheld." This is the same kind of comment as the previous item: it is not possible to state an automatic: 10 days may not be long enough. This is a circumstance where other innocent people are involved; the law recognizes their right to fair treatment. So should the comments.

11/22/05 1:55 PM [27] OTS-8492.2
NEW SECTION
WAC 44-14-05004 Responsibilities of agency in providing records. (1) **General.** An agency may simply provide the records or make them available within the five-business day period of the initial response. When it does so, an agency should also provide the requestor a written cover letter or e-mail forwarding the records briefly describing the records provided and informing the requestor that the request has been closed. See WAC 44-14-05026. This assists the agency in later proving that it provided the specified records on a certain date and told the requestor that the request had been closed. However, a cover letter or e-mail might not be practical in some circumstances, such as when the agency provides a small number of records or fulfills routine requests to frequent requestors.
An agency can, of course, provide the records sooner than five business days. Providing the "fullest assistance" to a requestor would mean providing a readily available record as soon as

possible. For example, an agency might routinely prepare a premeeting packet of documents three days in advance of a city council meeting. The packet is readily available so the agency should provide it to a requestor on the same day of the request so he or she can have it for the council meeting. However, an agency is not required to provide a record sooner than five business days. RCW 42.17.320.

(2) **Means of providing access.** An agency must make nonexempt public records "available" for inspection or provide a copy. RCW 42.17.270. An agency is only required to make records "available" and has no duty to explain the meaning of public records. Making records available is often called "access." The model rules use the term "access" to describe an agency making records available. Access to a public record can be achieved by allowing inspection of the record, providing a copy, or posting the record on the agency's web site and assisting the requestor in finding it (if necessary). The requestor can specify which method of access (or combination, such as inspection and then copying) he or she prefers. Different processes apply to requests for inspection versus copying (such as copy charges) so an agency should clarify with a requestor whether he or she seeks to inspect or copy a public record.

An agency can provide access to a public record by posting it on its web site. If requested, an agency should provide reasonable assistance to a requestor in finding a public record posted on its web site. If the requestor does not have internet access, the agency may provide access to the record by allowing the requestor to view the record on a specific computer terminal at the agency open to the public. An agency is not required to do so. Despite

the availability of the record on the agency's web site, a requestor can still make a public records request and obtain a copy of the record by paying the appropriate per-page copying charge for a record.

(3) **Providing records in installments.** The act now provides that an agency must provide records "if applicable, on a partial or installment basis as records that are part of a larger set of requested records are assembled or made ready for inspection or disclosure." RCW 42.17.270 (2005). The purpose of this provision is to allow requestors to obtain records in batches as they are assembled and to allow agencies to provide records in logical batches. The provision is also designed to allow an agency to only assemble the first installment and then see if the requestor claims or reviews it before assembling the next installments.

Not all requests should be provided in installments. For example, a request for a small number of documents which are located at nearly the same time should be provided all at once.

Installments are useful for large requests when, for example, an agency can provide the first box of records as an installment. An agency has wide discretion to determine when providing records in installments is "applicable." However, an agency cannot use installments to delay access by, for example, calling a small number of documents an "installment" and sending out separate notifications for each one. The agency must provide the "fullest assistance" and the "most timely possible action on requests." RCW 42.17.290.

(4) **Failure to provide records.** A "denial" of a request can occur when an agency:

Does not have the record;

Fails to respond to a request;

Claims an exemption of the entire record or a portion of it; or

Does not provide the record after the reasonable estimate expires without the agency seeking additional time to provide the record.

(a) **When the agency does not have the record.** An agency is only required to provide access to public records it has or has used.[2] An agency is not required to create a public record in response to a request. See WAC 44-14-04009.

An agency must only provide access to public records in existence at the time of the request. An agency is not obligated to supplement responses. Therefore, if a public record is created or comes into the possession of the agency after the request is received by the agency, it is not responsive to the request and need not be provided. A requestor must make a new request to obtain subsequently created public records.

Sometimes more than one agency holds the same record. When more than one agency holds a record, and a requestor makes a request to the first agency, the first agency cannot respond to the request by telling the requestor to obtain the record from the second agency. Instead, an agency must provide access to a record it holds regardless of its availability from another agency.[3]

An agency is not required to provide access to records that were not requested. An agency does not "deny" a request when it does not provide records that are outside the scope of the request because they were never asked for.

(b) **Claiming exemptions.**

(i) **Redactions.** If a portion of a record is exempt from disclosure, but the remainder is not, an agency generally is required to redact (black out) the exempt portion and then provide the remainder. RCW 42.17.310(2). There are a few exceptions.[4] Withholding an entire record because only a portion of it is exempt violates the act.[5] Some records are almost entirely exempt but

small portions remain nonexempt. For example, legal advice in a memorandum from an attorney to a client is exempt from disclosure under the attorney-client privilege. See WAC 44-14-06004. The body of the memorandum containing the legal advice could be redacted. However, except in the rare circumstance where their identity is exempt, the "to" and "from" information is not typically exempt and generally should be disclosed.

Statistical information "not descriptive of any readily identifiable person or persons" is generally not subject to redaction or withholding. RCW 42.17.310(2). For example, if a statute exempted the identity of a person who had been assessed a particular kind of penalty, and an agency record showed the amount of penalties assessed against various persons, the agency must provide the record with the names of the persons redacted but with the penalty amounts remaining.

Originals should not be redacted. An agency should redact materials by first copying the record and then either using a black marker on the copy or covering the exempt portions with copying tape, and then making a copy. Electronic redactions on computer records are not always secure so marking or masking a paper copy and recopying may be the best method for redacting.

(ii) **Brief explanation of withholding.** When an agency claims an exemption for an entire record or portion of one, it must inform the requestor of the statutory exemption and provide a brief explanation of how the exemption applies to the record or portion withheld. RCW 42.17.310(4). The brief explanation should cite the statute the agency claims grant an exemption from disclosure. The brief explanation should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as "proprietary" or "privacy" are insufficient.

One way to properly provide a brief explanation of the withheld record or redaction is for the agency to provide a withholding index. It identifies the type of record, its date and number of pages, and the author or recipient of the record (unless their identity is exempt).[6] The withholding index need not be elaborate but should allow a requestor to make a threshold determination of whether the agency has properly invoked the exemption.

(5) **Notifying requestor that records are available.** If the requestor sought to inspect the records, the agency should notify

him or her that the entire request or an installment are available for inspection and ask the requestor to contact the agency to arrange for a mutually agreeable time for inspection.[7] The notification should recite that if the requestor fails to make arrangements to inspect or copy the records within thirty days of

the date of the notification that the agency will close the request and refile the records. See WAC 44-14-05024. An agency might consider on a case-by-case basis sending the notification by certified mail to document that the requestor received it. If the requestor sought copies, the agency should notify him or her of the projected costs and whether a copying deposit is required before the copies will be made. The notification can be verbal to provide the most timely possible response.

(6) **Documenting compliance.** An agency should have a process to identify which records were provided to a requestor and the date of production. In some cases, an agency may wish to number-stamp or number-label paper records provided to a requestor to document which records were provided. The agency could also keep a copy of the numbered records so either the agency or requestor can later determine which records were or were not provided. However, the agency should balance the benefits of stamping or labeling the documents and making extra copies against the costs and burdens of doing so.

Memorializing which documents were offered for inspection is usually impractical. An agency might consider documenting which records were provided for inspection by making a rough list of them.

Notes: 1*Bonamy v. City of Seattle*, 92 Wn. App. 403, 409, 960 P.2d 447 (1998), *review denied*, 137 Wn.2d 1012, 978 P.2d 1099 (1999).

2*Sperr v. City of Spokane*, 123 Wn. App. 132, 136-37, 96 P.3d 1012 (2004).

3*Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 132, 580 P.2d 246 (1978).

4The two main exceptions to the redaction requirement are state "tax information" (RCW 82.32.330 (1)(c)) and law enforcement case files in active cases (*Newman v. King County*, 133 Wn.2d 565, 574, 947 P.2d 712 (1997). Neither of these two kinds of records must be redacted but rather may be withheld in their entirety.

5*Seattle Fire Fighters Union Local No. 27 v. Hollister*, 48 Wn. App. 129, 132, 737 P.2d 1302 (1987).

6*Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 271, n.18, 884 P.2d 592 (1994) ("PAWS II").

7For smaller requests, the agency might simply provide them with the initial response or earlier so no notification is necessary.

[]

WAC 44-14-05004(4)(b)(i) - do we really have to disclose the portion of the attorney/client privileged memo? Some way to avoid mentioning?

p. 27 WAC 44-14-05004 (2)- Delete sentence "The requestor can specify which method of access (or combination, such as inspection, then copying) he or she prefers." Explanation: We would eventually like to be able to provide a citizen with PDF scanning/copying resources. The agency must allow records inspection and provide copies. But it should be up to the agency how this is handled, with the understanding the citizen is not charged for copies unless he/she requests them to take.

p. 28- WAC 44-14-05004 (4)(a)- reference to record "in existence"; this does not include unallocated hard drive space. It should also be stated does not include paper in shredder etc; records which have been discarded/destroyed. Otherwise,

the argument would go that the agency has to buy special software; reassemble records tossed out, shredded etc. in accord with legitimate retention policy.

p. 29- WAC 44-14-05004 (b)(i)- REDACTIONS: The comments should delete the sentence: "The body of a memo containing legal advice could be redacted... but not 'to' and 'from'. Attorney client communications are privileged. This includes "to" and "from" parts of a legal advice memo. This kind of mentality would suggest a legal advice memo could be redacted to leave the words "and" and "to" but take out the nouns and verbs. Legal advice memos are 100% privileged.

HARD DRIVES: This also raises issue of hard drive redaction. Agency should not have to redact a hard drive. Only identifiable records should be subject to redaction. This does include electronically stored records, but not "hard drives" per se.

p. 30 WAC 44-14-05004 (5)- Notifying Requestor that records are available. Recommend: if requestor's contact information is no good, records need not be retained; also request taking out 30 days as a minimum standard to hold records. Two weeks or 20 days should be long enough. Also recommend that this time frame be stated in adopted rule of an agency.

NEW SECTION
11/22/05 1:55 PM [31] OTS-8492.2
WAC 44-14-04005 Inspection records. (1) **Obligation of requestor to claim or review records.** After the agency notifies the requestor that the records or an installment of them are ready for inspection or copying, the requestor must claim or review the records or the installment. RCW 42.17.300 (2005). "Claim or review" means making arrangements to review or copy the entire request or an installment. An agency should provide the requestor thirty days to make arrangements to claim or review the records. See WAC 44-14-05024. If the requestor cannot claim or review the records him or herself, a representative may do so within the thirty-day period.
If a requestor fails to claim or review the records or an installment after the expiration of thirty days, an agency is authorized to stop assembling the remainder of the records or making copies. RCW 42.17.300 (2005). If the request is abandoned, the agency is no longer bound by the records retention requirements of the act prohibiting the scheduled destruction of a requested record. RCW 42.17.290.
If a requestor fails to claim or review the records or any installment of them within the thirty-day notification period, the

agency may close the request and refile the records. If a requestor who has failed to claim or review the records then requests the same or almost identical records again, the agency, which has the flexibility to prioritize its responses to be most efficient to all requestors, can process the second request for the now-returned records last.

(2) **Time, place, and conditions for inspection.** Inspection should occur at a time mutually agreed (within reason) by the agency and requestor. An agency should not limit the time for inspection to times in which the requestor is unavailable. Requestors cannot dictate unusual times for inspection. The agency is only required to allow inspection during the agency's customary office hours. RCW 42.17.280. Often an agency will provide the records in a conference room or other office area.

The inspection of records cannot create "excessive interference" with the other "essential functions" of the agency. RCW 42.17.290. Similarly, copying records at agency facilities cannot "unreasonably disrupt" the operations of the agency. RCW 42.17.270.

An agency may have an agency employee observe the inspection of records to ensure they are not destroyed or disorganized. RCW 42.17.290. A requestor cannot alter, mark on, or destroy an original record during inspection. To select a record for copying during an inspection, a requestor must use a nonpermanent method such as a removable adhesive note or paper clip.

Inspection times can be broken down into reasonable segments such as half days. However, inspection times cannot be broken down into unreasonable segments to either harass the agency or delay access to the timely inspection of records.

Note: 1*See, e.g.*, WAC 296-06-120 (department of labor and industries provides thirty days to claim or review records).

11/22/05 1:55 PM [32] OTS-8492.2

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p. 31 WAC 44-14-04005 (1) [note number system is mixed up]- same as prior comment as to 30 day waiting period for Requestor to pick up records.

p. 31 WAC 44-14-04005 (2)- very poor guidance as to what is "excessive interference" and the meaning of "unreasonably disrupt". Recommend: agencies be given authority to adopt local rules to establish reasonable definitions for these items.

NEW SECTION

WAC 44-14-04006 Closing request and documenting compliance.

(1) **Fulfilling request and closing letter.** A records request has been fulfilled and can be closed when a requestor has inspected all

the requested records, all copies have been provided, a web link has been provided (with assistance from the agency in finding it, if necessary), an objectively unclear request has not been clarified, a request or installment has not been claimed or reviewed, or the requestor cancels the request. An agency should provide a closing letter stating the scope of the request and memorializing the outcome of the request. The outcome described in the closing letter might be that the requestor inspected records, copies were provided (with the number range of the stamped or labeled records, if applicable), the agency sent the requestor the web link, the requestor failed to clarify the request, the requestor failed to claim or review the records within thirty days, or the requestor canceled the request. The closing letter should also ask the requestor to promptly contact the agency if he or she believes additional responsive records have not been provided.
(2) **Returning assembled records.** An agency is not required to keep assembled records set aside indefinitely. This would "unreasonably disrupt" the operations of the agency. RCW 42.17.270. After a request has been closed, an agency should return the assembled records to their original locations. Once returned, the records are no longer subject to the prohibition on destroying records scheduled for destruction under the agency's retention schedule. RCW 42.17.290.
(3) **Retain copy of records provided.** In some cases, it may be wise for the agency to keep a separate copy of the records it copied and provided in response to a request. This allows the agency to document what was provided. A growing number of requests are for a copy of the records provided to another requestor, which can easily be fulfilled if the agency retains a copy of the records provided to the first requestor. The copy of the records provided should be retained for a period of time consistent with the agencies retention schedules for documents with legal value.
[]

WAC 44-14-04006(1) - closing letter necessary? Isn't documentation of response sufficient. Creates extra step.

p. 32 WAC 44-14-04006 (3) last sentence: retaining copy of records provided- this should not extend normal retention schedule. Once a record is provided, it should not then have to be retained an additional length of time simply because it had been requested. Many public records requests are filled on the spot- customer comes in and asks for a copy of an ordinance and gets it (often at no cost). The comments should not create a paper monster; cause agencies to waste time and resources.

11/22/05 1:55 PM [33] OTS-8492.2
NEW SECTION
WAC 44-14-04007 Later-discovered records. An agency has no obligation to search for records responsive to a closed request. Sometimes an agency discovers responsive records after a request has been closed. An agency should provide the later-discovered records to the requestor.
[]
WAC 44-14-04007 - need time frame to provide later discovered records and qualifier if can't delete it

Comments to WAC 44-14-050
NEW SECTION
WAC 44-14-05001 Access to electronic records. Many agency records are in an electronic format.[1] An agency may provide public records in an electronic format commercially available to the requestor but is not required to do so.
If the electronic records are readable only with special software available to the agency, but are unreadable to the requestor without the software, the agency has two options. First, it may print out the records and then provide paper copies to the requestor. As a practical matter, this may be the best practice for most requests, particularly ones that are for a small number of records. Second, for large requests where printing records may be prohibitive, the agency may allow the requestor to view the records at the agency location and then provide the requestor with the option of purchasing printed documents. However, there must be access to electronic public records. Offering records in an unreadable format, when they could readily be provided in a readable printed format, is not providing "access" to the records.
Note: [1]This section discusses electronic public records, not data bases requiring customized access.
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NEW SECTION
WAC 44-14-05002 "Customized access" to electronic records.
11/22/05 1:55 PM [36] OTS-8492.2
(1) **No duty to create electronic records.** The agency is not required to create a new record in response to a request.[1] However, sometimes it is easier for an agency to create a record than to dispute the merits of a given request. An agency may, at its

discretion, provide customized access to electronic records. The requestor must pay the agency's actual costs for providing customized access.

(2) **Complications of providing customized access to electronic records and data bases.** Many agencies maintain electronic records and data bases. A requestor might seek a few of the fields in a data base or to query a term. This will be referred to as "customized access" in the model rules.

The definition of "public record" includes "existing data compilations from which information may be obtained or translated." RCW 42.17.020(48). This would include many electronic records and data bases. However, an agency is not required to "create" a new public record. Balancing these two principles, and taking into account the often limited resources of an agency, it would be reasonable for an agency to consider customized access, but only if doing so would be relatively easy to accomplish. Another factor would be if the agency routinely keeps or uses the electronic information in the way requested. If so, the agency should provide it. If not, satisfying the request would probably require the creation of a new record.

The burden on the agency is the primary factor that should be used to determine whether an agency should provide customized access.[2] For example, if customized access required a few steps (such as a few mouse clicks), an agency should consider doing so in order to provide the "fullest assistance" to the requestor. If customized access required significant agency staff time or special computer programming, the agency is not obligated to provide customized access. An agency is not required to provide an electronic copy of the data base when one or more fields are exempt from disclosure but cannot be electronically redacted or where electronic redaction would involve undue expense. An agency is not required to provide customized access if doing so would violate an agency's software license.

If the agency decides to provide customized access, the requestor must pay the agency's costs, which might include staff time or special programming. RCW 43.105.280 (fees for staff time to respond to requests, and other direct costs may be included in costs of providing customized access).

Notes: [1]*Smith v. Okanogan County*, 100 Wn. App. 7, 14, 994 P.2d 857 (2000).

[2]*See* RCW 43.105.270 (state agencies should provide records electronically "within existing resources").

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Comments to WAC 44-14-060

NEW SECTION

WAC 44-14-06001 Agency must publish list of applicable

exemptions. An agency must publish and maintain a list of the "other statute" exemptions from disclosure (that is, those exemptions found outside the Public Records Act) that it believes potentially exempt its records from disclosure. RCW 42.17.260(2). The list is "for informational purposes only" and an agency's failure to list an exemption "shall not affect the efficacy of any exemption." RCW 42.17.260(2). A list of possible "other statute" 11/22/05 1:55 PM [38] OTS-8492.2
exemptions is posted on the web site of the Municipal Research Service Center at www.mrsc.org/****Publications/prdpub04.pdf (scroll to Appendix C).
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NEW SECTION
WAC 44-14-06002 Summary of exemptions. (1) **General.** The act and other statutes contain hundreds of exemptions from disclosure and dozens of court cases interpret them. A full treatment of all exemptions is beyond the scope of the model rules. Instead, these comments to the model rules provide general guidance on exemptions and summarize a few of the most frequently invoked exemptions. However, the scope of exemptions is determined exclusively by statute and case law; the comments to these model rules merely provide guidance on a few of the most common issues.
An exemption from disclosure will be narrowly construed in favor of disclosure. RCW 42.17.251. An exemption from disclosure must specifically exempt a record or portion of a record from disclosure. RCW 42.17.260(1). An exemption will not be inferred.[1] The act itself contains numerous exemptions. RCW 42.17.310 (1)(a) through (ggg) and 42.17.311 through 42.17.31915. However, many more exemptions are contained outside the act. RCW 42.17.260(1) provides that a record may be exempt under an "other statute" which exempts or prohibits disclosure of specific information or records. Numerous "other statute" exemptions exist outside the act. For example, trade secrets are exempt under the Uniform Trade Secrets Act (RCW 19.108).[2]
An agency cannot define the scope of a statutory exemption through rule making or policy.[3] An agency agreement or promise not to disclose a record cannot circumvent the act. RCW 42.17.260(1).[4] Any agency contract regarding the disclosure of records should recite that the act controls.
An agency must describe why each withheld record or redacted portion of a record is exempt from disclosure. RCW 42.17.310(4). One way to describe why a record was withheld or redacted is by using a withholding index. See WAC 44-14-04020.

After invoking an exemption in its response, an agency may revise its original claim of exemption in a response to a motion to show cause.[5] See WAC 44-14-08007.

Some statutes provide that a record is "exempt" from disclosure and others provide that a record is "confidential" or

otherwise prohibit disclosure.

Exemptions are "permissive rather than mandatory." Op. Att'y Gen. 1 (1980), at 5. In such cases, an agency has the discretion to provide an exempt record. However, in contrast to a waivable "exemption," an agency cannot provide a record when a statute makes it "confidential" or otherwise prohibits disclosure. For example, the Health Care Information Act generally prohibits the disclosure of medical information without the patient's consent. RCW 70.02.020(1). An agency and its employees are immune from liability to a third party for releasing a record when they are attempting to follow the act in good faith. RCW 42.17.258. However, if a statute classifies information as "confidential" or otherwise prohibits disclosure, an agency has no discretion to release a record or the confidential portion of it.[6] Some statutes provide civil and criminal penalties for the release of particular "confidential" records. See RCW 82.32.330(5) (release of certain state tax information a misdemeanor).

(2) **"Privacy" exemption.** There is no general "privacy" exemption. Op. Att'y Gen. 12 (1988).[7] However, a few specific exemptions incorporate privacy as one of the elements of the exemption. For example, personal information in agency employee files is exempt to the extent that disclosure would violate the employee's right to "privacy." RCW 42.17.310 (1)(b). "Privacy" is then one of the elements, in addition to the others in RCW 42.17.310 (1)(b), that an agency choosing not to disclose or a third party resisting disclosure must prove.

"Privacy" is defined in RCW 42.17.255 as the disclosure of information that "(1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." This is a two-part test requiring the party seeking to prevent disclosure to prove both elements.[8]

Because "privacy" is not a stand-alone exemption, an agency cannot claim RCW 42.17.255 as an exemption.[9]

(3) **Attorney-client privilege.** The attorney-client privilege statute, RCW 5.60.060 (2)(a), is an "other statute" exemption from disclosure.[10] In addition, RCW 42.17.310 (1)(j) exempts attorney work-product involving a "controversy," which means contemplated, existing, or reasonably anticipated litigation involving the agency.[11] Discussion of the scope of the attorney-client privilege and work-product doctrine is too broad for these comments. However, in general, the attorney-client privilege covers records

reflecting communications transmitted in confidence between a public official or employee of a public agency acting in the performance of his or her duties and an attorney serving in the capacity of legal advisor for the purpose of rendering or obtaining legal advice, and records prepared by the attorney in furtherance of the rendition of legal advice. It does not exempt records merely because they reflect communications in meetings where legal counsel was present or because a record or copy of a record was provided to legal counsel if the other elements of the privilege are not met.[12] A guidance document prepared by the attorney general's office on the attorney-client privilege and work-product

doctrine is available at www.atg.wa.gov/records/modelrules.

(4) **Deliberative process exemption.** RCW 42.17.310 (1)(i) exempts "Preliminary drafts, notes, recommendations, and intraagency memorandums in which opinions are expressed or policies formulated or recommended" except if the record is cited by the agency.

In order to rely on this exemption, an agency must show that the records contain predecisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions; and finally, that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.[13] Courts have held that this exemption is "severely limited" by its purpose, which is to protect the free flow of opinions by policy makers.[14] It applies only to recommendations, opinions, and proposed policies; it does not apply to factual data contained in the record.[15] The exemption does not apply to the entirety of a draft but rather only to the portions of it containing recommendations, opinions, and proposed policies. The exemption does not apply merely because a record is called a "draft" or stamped "draft." Recommendations that are actually implemented lose their protection from disclosure after they have been adopted by the agency.[16]

(5) **"Overbroad" exemption.** There is no "overbroad" exemption. RCW 42.17.270 (2005). See WAC 44-14-04005.

(6) **Commercial use exemption.** The act does not allow an agency to provide access to "lists of individuals requested for commercial purposes." RCW 42.17.260(9). An agency may require a requestor to sign a declaration that he or she will not put a list of individuals in the record to use for a commercial purpose.[17] While technically not an exemption, RCW 42.17.260(9) requires that an agency refuse to provide a list of individuals for a commercial use. This authority is limited to a list of individuals, not a

list of companies.[18] A requestor who signs a declaration promising not to use a list of individuals for a commercial purpose, but who then violates this declaration, could be charged with the crime of false swearing. RCW 9A.72.040.[19]

(7) **Trade secrets.** Many agencies hold sensitive proprietary information of businesses they regulate. For example, an agency might require an applicant for a regulatory approval to submit designs for a product it produces. A record is exempt from disclosure if it constitutes a "trade secret" under the Uniform Trade Secrets Act, chapter 19.108 RCW.[20] However, the definition of a "trade secret" is very complex and often the facts showing why the record is or is not a trade secret are only known by the potential holder of the trade secret who submitted the record in question.

When an agency receives a request for a record that might be a trade secret, often it does not have enough information on which it can make a determination as to whether the record qualifies as

a "trade secret." An agency is allowed additional time under the act to determine if an exemption might apply. RCW 42.17.320.

When an agency cannot determine whether a requested record contains a "trade secret," usually it should communicate with the requestor that the agency is providing the potential holder of the trade secret an opportunity to object to the disclosure. The agency should then contact the potential holder of the trade secret in question and state that the record will be released in a certain amount of time unless the holder files a court action seeking an injunction prohibiting the agency from disclosing the record under RCW 42.17.330. Alternatively, the agency can ask the potential holder of the trade secret for an explanation of whether the record might be a trade secret, and state that if the record is not a trade secret or otherwise exempt that the agency intends to release it. If it asks for such an explanation, the agency should inform the potential holder of the trade secret that the response will be shared with the requestor. The explanation can assist the agency in determining whether it will claim the trade secret exemption. If the agency concludes that the record is arguably not exempt, it should provide a notice of intent to disclose unless the potential holder of the trade secret obtains an injunction preventing disclosure under RCW 42.17.330.

As a general matter, many agencies do not assert the trade secret exemption on behalf of the individual or business but rather allow the potential holder of the trade secret to seek an injunction.

Notes: [1]*Progressive Animal Welfare Soc'y. v. Univ. of Wash.*, 125 Wn.2d 243, 262, 884 P.2d 592 (1994) (*"PAWS II"*).
[2]*Id.*
[3]*Servais v. Port of Bellingham*, 127 Wn.2d 820, 834, 904 P.2d 1124 (1995).
[4]*Spokane Police Guild v. Liquor Control Bd.*, 112 Wn.2d 30, 40, 769 P.2d 283 (1989); *Van Buren v. Miller*, 22 Wn. App. 836, 845, 592 P.2d 671, *review denied*, 92 Wn.2d 1021 (1979).

5*PAWS II*, 125 Wn.2d at 253.
6Op. Att'y Gen. 7 (1986).
7*See* RCW 42.17.255 ("privacy" linked to rights of privacy" specified in (the act) as express exemptions").
8*King County v. Sheehan*, 114 Wn. App. 325, 344, 57 P.3d 307 (2002).
9Op. Att'y Gen. 12 (1988), at 3 ("The legislature clearly repudiated the notion that agencies could withhold records based solely on general concerns about privacy.").
10*Hangartner v. City of Seattle*, 151 Wn.2d 439, 453, 90 P.3d 26 (2004).
11*Dawson v. Daly*, 120 Wn.2d 782, 791, 845 P.2d 995 (1993).
12This summary comes from the attorney general's proposed definition of the privilege in the first version of HB 1758 (2005).
13*PAWS*, 125 Wn.2d at 256.
14*Hearst (2005) Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978); *PAWS II*, 125 Wn.2d at 256.
15*Id.*
16*Dawson*, 120 Wn.2d at 793.
17Op. Att'y Gen. 12 (1988). However, a list of individuals applying for professional licensing or examination may be provided to professional associations recognized by the licensing or examination board. RCW 42.17.260(9).
18Op. Att'y Gen. 2 (1998).
19RCW 9A.72.040 provides: "(1) A person is guilty of false swearing if he makes a false statement, which he knows to be false, under an oath required or authorized by law. (2) False swearing is a gross misdemeanor." RCW 42.17.270 authorizes an agency to determine if a requestor will use a list of individuals for commercial purpose. *See* Op. Att'y Gen. 12 (1988), at 10-11 (agency could require requestor to sign affidavit of noncommercial use).
20*PAWS II*, 125 Wn.2d at 262.
[]

p. 41 WAC 44-14-06002 (7)- this comment allows an agency to notify a 3rd party to protect its trade secrets. This may not be apparent the moment a public records request is submitted. This shows that the 10 day rule is sometimes unfair; an agency should be allowed to grant a 3rd party more than 10 days: what if the 3rd party calls up on the 9th day and asks for another week? Should have some reasonable application here. See language: "If agency determines a record is arguably not exempt..." Some of these decisions are difficult. There should be adequate time for an agency and 3rd party to examine.

Comments to WAC 44-14-070
11/22/05 1:55 PM [43] OTS-8492.2
NEW SECTION
WAC 44-14-07001 General rules for charging for copies. (1) **No fees for costs of inspection.** An agency cannot charge a fee for locating public records or for preparing the records for inspection or copying. RCW 42.17.300.1 An agency cannot charge a "redaction fee" for the staff time necessary to prepare the records for inspection, for the copying required to redact records before they are inspected, or an archive fee for getting the records from offsite. Op. Att'y Gen. 6 (1991). These are the costs of making the records available for inspection or copying.
(2) **Standard photocopy charges.** Standard photocopies are black and white 8x11 paper copies. An agency can choose to calculate its copying charges for standard photocopies or to opt for a default copying charge of no more than fifteen cents per page.
If it attempts to charge more than the fifteen cents per page maximum for photocopies, an agency must establish a statement of

the "actual cost" of the copies it provides, which must include a "statement of the factors and the manner used to the determine the actual per page cost." RCW 42.17.260(7). An agency may include the costs "directly incident" to providing the copies such as paper, copying equipment, and staff time to make the copies. RCW 42.17.260(7)(a).[2] An agency failing to properly establish a copying charge in excess of the default fifteen cents per page maximum is limited to the default amount. RCW 42.17.260(7) and 42.17.300. If it charges more than the default rate of fifteen cents per page, an agency must provide its calculations and the reasoning for its charges. RCW 42.17.260(7) and 42.17.300.[3] A price list with no analysis is insufficient. An agency's calculations and reasoning need not be elaborate but should be detailed enough to allow a requestor or court to determine if the agency has properly calculated its copying charges. An agency should generally compare its copying charges to those of commercial copying centers. If an agency opts for the default copying charge of fifteen cents per page, it need not calculate its actual costs. RCW 42.17.260(8).

(3) **Charges for copies other than standard photocopies.** Nonstandard copies include color copies, engineering drawings, computer disks, and photographs. An agency can charge its actual costs for nonstandard photocopies. RCW 42.17.300. For example, when an agency provides records in an electronic format by putting the records on a disk, it may charge its actual costs for the disk. The agency's documentation of the costs of nonstandard copies can be less detailed than its calculations for standard photocopies because it can only charge its actual costs for nonstandard copies and actual costs are easier to document. The agency can provide a

requestor with documentation for its actual costs by providing a catalog or price list from a vendor.

(4) **Copying charges apply to copies selected by requestor.** Often a requestor will seek to inspect a large number of records but only select a smaller group of them for copying. Copy charges can only be charged for the records selected by the requestor. RCW 42.17.300 (charges allowed for "providing" copies to requestor). The requestor should specify in the request form or otherwise whether he or she seeks inspection or copying. If he or she seeks inspection, the agency should inform the requestor that inspection is free. If he or she seeks copies, then the agency should inform the requestor of the copying charges for the request. An agency should not assemble a large number of records, fail to inform the requestor that inspection is free, and then attempt to charge for copying all the records.

Sometimes a requestor will choose to pay for the copying of a large batch of records without inspecting them. This is allowed,

provided that the requestor is informed that inspection is free. Informing the requestor on a request form that inspection is free is sufficient.

(5) **Use of outside vendor.** An agency is not required to copy records at its own facilities. An agency can send the project to a commercial copying center and bill the requestor for the amount charged by the vendor. An agency is encouraged to do so when an outside vendor can make copies more quickly and less expensively than an agency. An agency can arrange with the requestor for him or her to pay the vendor directly. An agency cannot charge the default fifteen cents per page rate when its "actual cost" at a copying vendor is less. The default rate is only for agencyproduced copies. RCW 42.17.300.

(6) **Sales tax.** An agency cannot charge sales tax for providing copies of public records. RCW 82.12.02525.

(7) **Costs of mailing.** If a requestor asks an agency to mail copies, the agency may charge for the actual cost of postage and the shipping container (such as an envelope). RCW 42.17.270 (6)(a).

Notes: 1*See also* Op. Att'y Gen. 6 (1991).

2The costs of staff time is allowed only for making copies. An agency cannot charge for staff time for locating records or other noncopying functions. *See* RCW 42.17.300 ("No fee shall be charged for locating public documents and making them available for copying.").

3*See also* Op. Att'y Gen. 6 (1991) (agency must "justify" its copy charges).

[]

p. 43 WAC 44-14-07001 (2)- although an agency cannot charge sales tax, if it has a 3rd party copy the records and itself is charged sales tax by the copier, it can pass on that cost; see p. 44, WAC 44-14-07001 (6)

General Comment:
The following comments are my composite of comments during informal meetings of some members of the Spokane City Attorney office staff. They do not reflect official comments on behalf of the City of Spokane, but are intended as study comments to promote further development of the proposed rules as may be useful. There were some good items in the Attorney General draft WACs. Some other problems I feel may be derived in part from difficulties inherent in the statute and may need to be addressed legislatively. There were also areas where changes or clarifications are recommended.

11/22/05 1:55 PM [45] OTS-8492.2
NEW SECTION
WAC 44-14-07003 Charges for electronic records. An agency may provide a paper copy of an electronic record. Providing a paper copy is "access" to the record. The act does not allow a requestor to specify the format of a copy by demanding, for example, an electronic copy. When an agency provides a paper copy of an electronic record, it can charge its usual copy charge for a printed record.
Providing records in an electronic format is allowed if the requestor and agency agree. This is often more efficient for both parties. If the requestor agrees, an agency could charge a perpage scanning fee to provide scanned records in an electronic format. The agency must establish the scanning fee in a cost schedule conforming to RCW 42.17.300.
[]

NEW SECTION
WAC 44-14-07004 Other statutes govern copying of particular records. The act generally governs copying charges for public records, but several specific statutes govern charges for particular kinds of records. RCW 42.17.305. The following nonexhaustive list provides some examples: RCW 46.52.085 (charges for traffic accident reports), RCW 10.97.100 (copies of criminal histories), RCW 3.62.060 and 3.62.065 (charges for certain records of municipal courts), and RCW 70.58.107 (charges for birth certificates).
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11/22/05 1:55 PM [46] OTS-8492.2
NEW SECTION
WAC 44-14-07005 Waiver of copying charges. An agency has the

discretion to waive copying charges. For administrative convenience, many agencies waive copying charges for small requests. For example, the attorney general's office does not charge copying fees if the request is for twenty-five or fewer standard photocopies.
[]

NEW SECTION
WAC 44-14-07006 Requiring partial payment. (1) **Copying deposit.** An agency may charge a deposit of up to ten percent of the estimated copying costs of an entire request before beginning to copy the records. RCW 42.17.300 (2005).[1] The estimate must be reasonable. An agency can require the payment of the deposit before copying an installment of the records or the entire request. The deposit applies to the records selected for copying by the requestor, not all the records made available for inspection. An agency is not required to charge a deposit. An agency might find a deposit burdensome for small requests where the deposit might be only a few dollars. Any unused deposit must be refunded to the requestor.
When copying is completed, the agency can require the payment of the remainder of the copying charges before providing the records. For example, a requestor makes a request for records that comprise one box of paper documents. The requestor selects the entire box for copying. The agency estimates that the box contains three thousand pages of records. The agency charges ten cents per page so the cost would be three hundred dollars. The agency obtains a ten percent deposit of thirty dollars and then begins to copy the records. The total number of pages turns out to be two thousand nine hundred so the total cost is two hundred ninety dollars. The thirty dollar deposit is credited to the two hundred ninety dollars. The agency requires payment of the remaining two hundred sixty dollars before providing the records to the

requestor.
(2) **Copying charges for each installment.** If an agency provides records in installments, the agency may charge and collect all applicable copying fees (not just the ten percent deposit) for each installment. RCW 42.17.300 (2005). The agency may agree to provide an installment without first receiving payment for that installment.
Note: [1]*See* RCW 42.17.300 (2005) (ten percent deposit for "a request").
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Specific Comments:

1. We have heard (verbally) about a possible action that the AG's office may seek legislation to limit penalty to $5/Day to government that adopts the local rules and hammer others with $100/day penalty

COMMENT: This illustrates the need to acknowledge a "good faith" defense.
Proposed language:

The Legislature declares that governmental entities subject to the public records act have a "good faith" defense. The good faith defense consists of showing facts and circumstances that there was a reasonable basis for failure to make a full or complete disclosure of public records, even where a court ultimately rules the failure was in violation of the requirements of the PDA. To establish a good faith defense, the defendant government must show:

a. Its actions were in compliance with adopted rules not inconsistent with the AG model rules or
b. Its actions were taken in good faith, based on a reasonable understanding or interpretation of the requirements of the PDA, even if such understanding or interpretation was not ultimately deemed correct or
c. Any other basis constituting a showing of good faith, consistent with the mandate of the PDA to require full disclosure, narrowly interpret exemptions, protect privacy, promote efficient administration of government, prevent destruction or modification of public records, and not unreasonably disrupt agency operations or excessively interfere with essential governmental functions.

2. Should the AG comments be published? Some we like; others we don't or feel may need clarification. We would like to see the final draft before responding.

Comments to WAC 44-14-080
NEW SECTION
WAC 44-14-08001 Agency internal procedure for review of denials of requests. The act requires an agency to "establish mechanisms for the most prompt possible review of decisions denying" records requests. RCW 42.17.320. An agency internal review of a denial need not be elaborate. It could be reviewed by the public records officer's supervisor.
[]

NEW SECTION

WAC 44-14-08002 Attorney general's office review of denials by state agencies. The attorney general's office is authorized to review a state agency's claim of exemption and provide a written opinion. RCW 42.17.325. This only applies to state agencies and a claim of exemption. See WAC 44-06-160. A requestor may initiate such a review by sending a request for review to Public Records Review, Office of the Attorney General, P.O. Box 40100, Olympia, Washington 98504-0100 or www.atg.wa.gov/records.
[]

11/22/05 1:55 PM [49] OTS-8492.2
NEW SECTION
WAC 44-14-08003 Alternative dispute resolution. Requestors and agencies are encouraged to resolve public records disputes through alternative dispute resolution mechanisms such as mediation and arbitration. No formal mechanisms for formal alternative dispute resolution currently exist in the act but parties are encouraged to resolve their disputes without litigation.
[]

NEW SECTION
WAC 44-14-08004 Judicial review. (1) **Seeking judicial review.** The act provides that an agency's decision to deny a request is final for purposes of judicial review two business days after the initial denial of the request. RCW 42.17.320.[1] Therefore, the statute allows a requestor to seek judicial review two business days after the initial denial whether or not he or she has exhausted the internal agency review process.[2] An agency should not have an internal review process that implies that a requestor cannot seek judicial review until internal reviews are complete because RCW 42.17.320 allows judicial review two business days after the initial denial.
The act provides a speedy remedy for a requestor to obtain a court hearing on whether the agency has violated the act. RCW 42.17.340 (1) and (2). The purpose of the quick judicial procedure is to allow requestors to expeditiously find out if they are entitled to obtain public records.[3] To speed up the court process, a public records case may be decided merely on the "motion" of a requestor "solely on affidavits." RCW 42.17.340 (1) and (3).
(2) **Statute of limitations.** The statute of limitations for an action under the act is one year after the agency's claim of

exemption or the last production of a record on a partial or installment basis. RCW 42.17.340(6) (2005).

(3) **Procedure.** To initiate court review of a public records case, a requestor can file a "motion to show cause" which directs the agency to appear before the court and show any cause why the

agency did not violate the act. RCW 42.17.340 (1) and (2).[4] The case must be filed in the superior court in the county in which the record is maintained. RCW 42.17.340 (1) and (2). In a case against a county, the case may be filed in the superior court of that county, or in the superior court of either of the two nearest adjoining counties. RCW 42.17.340(5) (2005). The show-cause procedure is designed so that a nonattorney requestor can obtain judicial review him or herself without hiring an attorney. A requestor can file a motion for summary judgment to adjudicate the case.[5] However, most cases are decided on a motion to show cause.[6]

(4) **Burden of proof.** The burden is on an agency to demonstrate that it complied with the act. RCW 42.17.340 (1) and (2).

(5) **Types of cases subject to judicial review.** The act provides three mechanisms for court review of a public records dispute.

(a) **Denial of record.** The first kind of judicial review is when a requestor's request has been denied by an agency. RCW 42.17.340(1). This is the most common kind of case.

(b) **"Reasonable estimate."** The second form of judicial review is when a requestor challenges an agency's "reasonable estimate" of the time to provide a full response. RCW 42.17.340(2). See WAC 44-14-04010.

(c) **Section 330 injunctive action to prevent disclosure.** The third mechanism of judicial review is an injunctive action to restrain the disclosure of public records. RCW 42.17.330. A Section 330 action can be initiated by the agency, a person named in the disputed record, or a person to whom the record "specifically pertains." The party attempting to prevent disclosure has the burden of proving the record is exempt from disclosure.[7] The party resisting disclosure must prove both the necessary elements of an injunction and that a specific exemption prevents disclosure.[8]

(6) **"In camera" review by court.** The act authorizes a court to review withheld records or portions of records "in camera." RCW 42.17.340(3). "In camera" means a confidential review by the judge alone in his or her chambers. Courts are encouraged to conduct an in camera review because it is often the only way to determine if an exemption has been properly claimed.[9]

An agency should prepare an in camera index of each withheld record or portion of a record to assist the judge's in camera

review. This is a second index, in addition to a withholding index provided to the requestor. The in camera index should number each withheld record or redacted portion of the record, provide the record or unredacted portion to the judge with a reference to the index number, and provide a brief explanation of each claimed exemption corresponding to the numbering system. The agency's brief explanation should not be as detailed as a legal brief because the opposing party will not have an opportunity to review it and respond. The agency's legal briefing should be done in the normal course of pleadings, with the opposing party having an opportunity to respond.

The in camera index and disputed records or unredacted portions of records should be filed under seal. The judge should explain his or her ruling on each withheld record or redacted portion by referring to the numbering system in the in camera index. If the trial court's decision is appealed, the in camera index and its attachments should be made part of the record on appeal and filed under seal in the appellate court.

(7) **Attorneys' fees, costs, and penalties to prevailing requestor.** The act requires an agency to pay a prevailing requestor's reasonable attorneys' fees, costs, and a daily penalty. RCW 42.17.340(4). Only a requestor can be awarded attorneys' fees, costs, or a daily penalty under the act; an agency or a third party resisting disclosure cannot.[10] A requestor is the "prevailing" party when he or she obtains a judgment in his or her favor, the suit was reasonably necessary to obtain the record, or a wrongfully withheld record was provided for another reason.[11] In a Section 330 injunctive action, the prevailing requestor cannot be awarded attorneys' fees, costs, or a daily penalty against an agency if the agency took the position that the record was subject to disclosure.[12]

The purpose of the act's attorneys' fees, costs, and daily penalty provisions is to reimburse the requestor for vindicating the public's right to obtain public records, to make it financially feasible for requestors to do so, and to deter agencies from improperly withholding records.[13] However, a court is authorized to only award "reasonable" attorneys' fees. RCW 42.17.340(4). A court has discretion to award attorneys' fees based on the "lodestar" analysis, which looks at a reasonable hourly rate and assesses which work was necessary to obtain the favorable result.[14] The award of "costs" under the act is for all of a requestor's nonattorney-fee costs and is broader than the court costs awarded to prevailing parties.[15]

A daily penalty of between five dollars to one hundred dollars must be awarded to a prevailing requestor, regardless of an agency's "good faith."[16] An agency's "bad faith" can warrant a

penalty on the higher end of this scale.[17] The penalty is per day, not per-record per-day.[18]

Notes: [1]*PAWS II*, 125 Wn.2d at 253 (RCW 42.17.320 "provides that, regardless of internal review, initial decisions become final for purposes of judicial review after two business days.").

[2]*See, e.g.*, WAC 44-06-120 (attorney general's office internal review procedure specifying that review is final when the agency renders a decision on the appeal, or the close of the second business day after it receives the appeal, "whichever occurs first").

[3]*Spokane Research & Def. Fund v. City of Spokane*, 121 Wn. App. 584, 591, 89 P.3d 319 (2004), *reversed on other grounds*, 155 Wn.2d 89, 117 P.3d 1117 (2005) ("The purpose of the PDA is to ensure speedy disclosure of public records. The statute sets forth a simple procedure to achieve this.").

[4]*See* generally *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117 (2005).

[5]*Id.*, 117 P.3d at 1126.

[6]*Wood v. Thurston County*, 117 Wn. App. 22, 27, 68 P.3d 1084 (2003).

[7]*Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 735, 744, 958 P.2d 260 (1998).

[8]*PAWS II*, 125 Wn.2d at 257-58.

[9]*Spokane Research & Def. Fund v. City of Spokane*, 96 Wn. App. 568, 577 & 588, 983 P.2d 676 (1999), *review denied*, 140 Wn.2d 1001, 999 P.2d 1259 (2000).

[10]RCW 42.17.340(4) (providing award only for "person" prevailing against "agency"); *Tiberino v. Spokane County Prosecutor*, 103 Wn. App. 680, 691-92, 13 P.3d 1104 (2000) (third party resisting disclosure not entitled to award).

[11]*Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 571, 59 P.3d 109 (2002); *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 117 P.3d 1117, 1124-25 (2005).

[12]*Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 735, 757, 958 P.2d 260 (1998).

[13]*Am. Civil Liberties Union v. Blaine Sch. Dist. No. 503*, 95 Wn. App. 106, 115, 975 P.2d 536 (1999) ("permitting a

liberal recovery of costs is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public's right to access to public records.").

[14]*Id.* at 118.

[15]*Id.* at 115.

[16]*American Civil Liberties Union v. Blaine School Dist. No. 503*, 86 Wn. App. 688, 698-99, 937 P.2d 1176 (1997) ("*ACLU I*").

[17]*Id.*

[18]*Yousoufian v. Office of Ron Sims*, 152 Wash.2d 421, 436, 98 P.3d 463 (2004).

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